DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1221
Title: Jacqueline Hillman, Petitioner
v.
Judy A. Maretta
Docketed: April 12, 2012
Lower Ct: Supreme Court of Virginia
Case Nos.: (102042)
Decision Date: January 13, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 11 2012	Petition for a writ of certiorari filed. (Response due May 14, 2012)
Apr 18 2012	Order extending time to file response to petition to and including May 31, 2012.
May 18 2012	Brief of respondent Judy A. Maretta in opposition filed.
May 29 2012	DISTRIBUTED for Conference of June 14, 2012.
May 29 2012	Reply of petitioner Jacqueline Hillman filed. (Distributed)
Jun 18 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 14 2012	Brief amicus curiae of United States filed.
Dec 14 2012	Letter proposing a lodging of the government's group life insurance contract with Metropolitan Life Insurance Company received from the Solicitor General.
Dec 26 2012	DISTRIBUTED for Conference of January 11, 2013.
Jan 11 2013	Petition GRANTED.
Feb 11 2013	SET FOR ARGUMENT ON MONDAY, April 22, 2013.
Feb 22 2013	Joint appendix filed. (Statement of costs filed)
Feb 22 2013	Brief of petitioner Jacqueline Hillman filed. (Distributed)
Mar 1 2013	CIRCULATED.
Mar 7 2013	Record received from Supreme Court of Virginia. (1 Box)
Mar 25 2013	Brief of respondent Judy A. Maretta filed (Reprinted). (Distributed)
Apr 1 2013	Brief amicus curiae of Association of Federal Health Organizations filed. (Distributed)
Apr 1 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 1 2013	Brief amicus curiae of United States filed. (Distributed)
Apr 12 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 15 2013	Reply of petitioner Jacqueline Hillman filed. (Distributed)
Apr 22 2013	Argued. For petitioner: Daniel H. Ruttenberg, Vienna, Va. For respondent: Steffen N. Johnson, Washington, D. C., and Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 11-1221

FILED
APR 11 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JACQUELINE HILLMAN,
Petitioner,

v.

JUDY A. MARETTA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Daniel H. Ruttenberg
Counsel of Record
SMOLEN PLEVY
8045 Leesburg Pike, Fifth Floor
Vienna, Virginia 22182
(703) 790-1900
dhruttenberg@smolenplevy.com

Counsel for Petitioner *Dated: April 11, 2012*

THE LEX GROUP DC • 1825 K Street N.W. • Suite 103 • Washington, D.C. 20006
(202) 955-0001 • (800) 856- • Fax: (202) 955-0022 • www.thelexgroup.com

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QUESTION PRESENTED

VA. CODE ANN. § 20-111.1(A) (2011) provides that a life insurance policy's revocable beneficiary designation naming a then spouse is deemed revoked upon the entry of a Final Decree of Divorce. 5 U.S.C. § 8705(a) provides that the proceeds from a Federal Employees Group Life Insurance (FEGLI) policy should be paid to the beneficiaries properly designated by the employee, and if none, then to the widow of the employee. If VA. CODE ANN. § 20-111.1(A) is preempted by 5 U.S.C. § 8705(a) or any other federal law, VA. CODE ANN. § 20-111.1(D) (2011), gives the widow (or whoever would otherwise be entitled to the insurance proceeds), after FEGLI insurance proceeds have been distributed to an ex-spouse, a domestic relations equitable remedy against the ex-spouse for the amount of the insurance proceeds received.

The Supreme Court of Virginia, in agreement with the Supreme Court of Alabama, the First, Seventh and Eleventh Circuits of the United States Court of Appeals and several lower federal courts, **but** in direct conflict with the Indiana Supreme Court, the Supreme Court of Mississippi, the Court of Appeals of North Carolina, the Appellate Court of Illinois, the Missouri Court of Appeals, the Court of Appeals of Texas, the Superior Court of New Jersey, Appellate Division, the Superior Court of Pennsylvania, and the Court of Appeals of Kentucky, held that 5 U.S.C. § 8705(a) preempts a state domestic relations equitable action against the beneficiary of a FEGLI policy after the insurance proceeds of such policy have been paid to such

beneficiary in accordance with the statutory order of precedence in 5 U.S.C. § 8705(a).

The question presented is whether 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 (FEGLIA) or any regulation promulgated thereunder preempts a state domestic relations equitable remedy which creates a cause of action against the recipient of FEGLI insurance proceeds after they have been distributed, like the one contained in VA. CODE ANN. § 20-111.1(D).

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The opinion of the Supreme Court of Virginia (App. 1a) is available at *Maretta v. Hillman*, 722 S.E.2d 32 (Va. 2012). The Order of the Circuit Court of Virginia granting summary judgment (App. 32a) is not reported. The letter opinion of the Circuit Court of Virginia overruling Respondent's Plea in Bar/Demurrer (App. 35a) is available at 80 Va. Cir. 439 and 2010 WL 7373701 (Va. Cir. Ct.).

JURISDICTION

The Supreme Court of Virginia entered judgment on January 13, 2012. The time for filing a petition for rehearing elapsed 30 days later on February 12, 2012. Va. Ct. R. 5:37(d). This Court has jurisdiction to review the federal preemption issues decided by the Supreme Court of Virginia under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. art. VI provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The relevant provisions of FEGLIA are as follows:

5 U.S.C. § 8705(a) provides, in relevant part:

> (a) Except as provided in subsection (e), the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> > First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title as provided by section 8706(b) of this title, in the Office of Personnel Management. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.
> >
> > Second, if there is no designated beneficiary, to the widow or widower of the employee.

5 U.S.C. § 8705(e) provides, in relevant part:

> (e)(1) Any amount which would otherwise be paid to a person determined under the order of precedence named by subsection (a) shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.
>
> (2) For purposes of this subsection, a decree, order, or agreement referred to in paragraph (1) shall not be effective unless it is received, before the date of the covered employee's death, by the employing agency or, if the employee has separated from service, by the Office.

5 U.S.C. § 8709(d)(1) provides:

> (d)(1) The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

The relevant provision of the federal regulations promulgated under FEGLIA is as follows:

5 C.F.R. § 870.802(f) provides:

> (f) An insured individual (or an assignee) may change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted.

The relevant provisions of VA. CODE ANN. § 20-111.1 (2011) are as follows:

> A. Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent.
>
> D. If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

STATEMENT OF THE CASE

This case squarely presents an important federal preemption issue which has not been, but should be settled by this Court – whether state domestic relations equitable actions may be maintained against the recipient of life insurance proceeds from a FEGLI policy after such proceeds have been paid to such beneficiary in accordance with the statutory order of precedence contained in 5 U.S.C. § 8705(a). This issue affects numerous families across the country who are already coping with the death of a loved one. Instead of being able to rely on the certainty of the law regarding who is entitled to FEGLI insurance proceeds, they find themselves embroiled in litigation, the outcome of which largely depends on which state court is ruling on the issue or whether the case is brought in federal or state court.

Moreover, VA. CODE ANN. § 20-111.1(D) is based on UNIF. PROBATE CODE § 2-804(h)(2) (amended 2008) which has already been adopted by 12 states and which the National Conference of Commissioners of Uniform State Laws is encouraging other states to adopt. Until this Court settles this matter, nationwide litigation will continue to increase as this issue now arises by statutory right instead of just under property settlement agreements and divorce decrees as it has in the past. In fact, so far in 2012, there have already been two state courts of last resort, the Supreme Court of Virginia and the Indiana Supreme Court, which have ruled in opposite of one another on this issue.

Furthermore, this Court has already recognized this is an important issue that must be settled. In *Kennedy v. Dupont Savings and Investment Plan*, when dealing with the analogous laws of the Employee Retirement Income Security Act of 1974 ("ERISA"), this Court specifically did not express any view (and some might say invited the issue to be brought before this Court) "as to whether the Estate could have brought an action in state or federal court against [Ex-Wife] to obtain the benefits after they were distributed." *Kennedy v. Dupont Savings and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 875 n. 10 (2009).

In this case, the relevant facts are not in dispute. *Maretta*, 722 S.E.2d at 33, App. 4a. Warren Hillman ("Insured") named Respondent/Defendant Judy Maretta ("Ex-Wife"), his wife at the time, as the beneficiary of his FEGLI policy in December 1996. *Id.* Insured and Ex-Wife divorced in December 1998. Insured married Petitioner/Plaintiff Jacqueline Hillman ("Widow") in October 2002. *Id.* Insured, however, never changed the beneficiary designation for his FEGLI policy. *Id.* Insured died in July 2008. *Id.* At the time of his death, Insured was still married to Widow. *Id.* After her husband's death, Widow filed a claim for benefits under Insured's FEGLI policy but was told the proceeds would be distributed to Insured's designated beneficiary, Ex-Wife. *Id.* Ex-Wife filed a claim for and received the death benefits under the FEGLI policy in the amount of $124,558.03. *Id.*

Widow filed a Complaint against Ex-Wife seeking damages under VA. CODE ANN. § 20-111.1(D)

in an amount equal to the proceeds Ex-Wife received from Insured's FEGLI policy. Complaint For Recovery of Death Benefit From Federal Employees' Group Life Insurance Policy, Paragraph B. Ex-Wife filed a Demurrer and Plea in Bar to Widow's Complaint claiming that FEGLIA preempts VA. CODE ANN. § 20-111.1(D). Demurrer and Plea In Bar, Paragraph 8. "As Section 20-111.1(D) conflicts with Section 8705(a), by providing for the distribution of the value of the proceeds of the FEGLI policy to someone other than the designated beneficiary, Section 8705(a) and 8709(d)(1) of FEGLIA preempt Section 111.1(D) . . ." *Id.* Ex-Wife argued that FEGLIA preempts VA. CODE ANN. § 20-111.1(D) in Section III(D) of her brief supporting her Demurrer and Plea In Bar, titled "FEGLIA Also Preempts Virginia Code § 20-111.1(D), Such That Ms. Maretta Is Not Liable For the Amount of the Proceeds to Plaintiff." Memorandum In Support of Demurrer and Plea In Bar, 7-15.

The Honorable Michael F. Devine of the Circuit Court of Fairfax County held "that Virginia Code § 20–111.1(D) is not preempted by FEGLIA, and thus Ms. Maretta's Plea in Bar/Demurrer is hereby overruled. Ms. Maretta's exceptions to the Court's ruling are noted for each of the reasons ably articulated by her counsel on brief and at the May 7, 2010 hearing." *Hillman v. Maretta*, 80 Va. Cir. 439, 2010 WL 7373701, 10 (Va. Cir. Ct.), *rev'd*, 722 S.E.2d 32, App. 58a. The trial court then granted Widow summary judgment on the same grounds. Order Granting Summary Judgment, 1-2, App. 32a-33a. Ex-Wife preserved her right to appeal on the

grounds that FEGLIA preempts VA. CODE ANN. § 20-111.1(D) in her objections to the trial court's order. Order Granting Summary Judgment, 3, App. 34a.

Ex-Wife appealed the trial court's award of summary judgment to the Supreme Court of Virginia. Ex-Wife's Petition for Appeal. Ex-Wife's sole Assignment of Error was that "[t]he trial court erred in determining that Jacqueline Hillman's claim under Virginia Code § 20-111.1(D) was not preempted by federal law pursuant to the Federal Group Life Insurance Act, specifically 5 U.S.C. § 8709(d)(1), and awarding the Plaintiff summary judgment." *Id.* at 1. A divided Supreme Court of Virginia "reverse[d] the judgment of the circuit court. Because we conclude that FEGLIA preempts Code § 20-111.1(D), we will enter judgment for Maretta." *Maretta*, 722 S.E.2d at 38, App. 16a.

Widow respectfully files this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case. This Court needs to address this matter to bring the various state and federal courts in line with one another. Until it does so, there will be an increasing amount of needless nationwide litigation regarding this unresolved issue causing unnecessary hardship to grieving families.

REASONS FOR ALLOWANCE OF THE WRIT

I. THERE IS A WIDELY RECOGNIZED CONFLICT REGARDING WHETHER AN ACTION MAY BE BROUGHT AGAINST THE BENEFICIARY OF A FEGLI POLICY TO OBTAIN INSURANCE PROCEEDS AFTER THEY HAVE BEEN DISTRIBUTED IN ACCORDANCE WITH 5 U.S.C. § 8705(a).

Many state and federal courts have addressed the issue of whether FEGLIA preempts state domestic relations equitable remedies. In doing so, the more recent cases have noted the drastic split between the courts. *Hardy v. Hardy*, 963 N.E.2d 470, 2012 WL 859698 (Ind.), 3 ("[W]e note that several state and federal courts have explored whether FEGLIA preempts equitable state law claims and have reached disparate results."); *McCord v. Spradling*, 830 So. 2d 1188, 1203 (Miss. 2002) ("[W]hile the federal courts have held that FEGLIA preempts state equitable actions, such is not the case with the large majority of state courts that have addressed this issue."); *Maretta*, 722 S.E.2d at 37. ("We are aware . . . that our decision today stands in contrast to a majority of state court decisions."); *Metro. Life Ins. Co. v. Zaldivar*, 337 F. Supp. 2d 343, 346 n. 2 (D. Mass. 2004), *aff'd*, 413 F.3d 119 (1st Cir. 2005) ("In contrast [to our ruling] numerous state courts have held to the contrary."); *Fagan v. Chaisson*, 179 S.W.3d 35, 41 (Tex. App. 2005) ("Although the specific preemption question before us has yet to be addressed by this court, it has been considered both by federal and state courts outside this jurisdiction.

These courts have reached disparate results on the issue."); *Sedarous v. Sedarous*, 285 N.J. Super. 316, 320 (1995) ("The specific preemption question before us, while not yet addressed in this jurisdiction, has been considered both by federal and state courts, which have reached disparate results."); *Eonda v. Affinito*, 427 Pa. Super. 317, 322 n. 2 (1993) ("We are aware that appellant's position is supported by some state and federal (district and circuit court) case law; however, we note that none of the cases on this topic is binding on this court."); *Kidd v. Pritzel*, 821 S.W.2d 566, 569 (Mo. Ct. App. 1991) ("There has been a split in the jurisdictions about whether § 8705 should preempt all state law claims or whether the statute merely provides a simple procedure for payment of the policy's benefits.").

A. The Large Majority Of State Courts, In Contrast To The Supreme Court Of Virginia, Have Held That FEGLIA Does NOT Preempt A State Domestic Relations Equitable Action Against The Recipient Of Life Insurance Proceeds From A FEGLI Policy After Such Proceeds Have Been Distributed To Such Beneficiary In Accordance With 5 U.S.C. § 8705(a).

The Indiana Supreme Court, the Supreme Court of Mississippi, the Court of Appeals of Texas, the Superior Court of New Jersey, Appellate Division, the Superior Court of Pennsylvania, the Missouri Court of Appeals, the Appellate Court of Illinois, the Court of Appeals of North Carolina, and the Court of

Appeals of Kentucky have all found that FEGLIA does NOT preempt a state domestic relations equitable action against the recipient of FEGLI life insurance proceeds after such proceeds have been distributed to such beneficiary in accordance with 5 U.S.C. § 8705(a). The following is a short summary of each of the aforementioned court's rulings on the subject:

> *The Indiana Supreme Court*: In the March 2012 opinion, *Hardy v. Hardy*, the insured was required to designate his first wife and his grandchildren as equal beneficiaries under his FEGLI policy under a divorce decree and property settlement agreement. *Hardy*, 2012 WL 859698, 1-2. After his divorce from his first wife, the insured married his second wife and designated her as the beneficiary of his FEGLI policy. *Id.* He subsequently divorced his second wife, but did not change his beneficiary designation prior to his death. *Id.*

The Indiana Supreme Court held that FEGLIA did not preempt state law equitable claims against the individual who received FEGLI policy proceeds once they have been paid. *Id.* at 9.

> The sole purpose of section 8705 has always been to provide for the speedy and economic settlement of insurance claims." The section "fulfills the congressional intention by reducing administrative and legal hassles." Thus, once proceeds are paid out to a designated beneficiary, the purpose of § 8705

> has been achieved. And state law claims asserting an equitable interest in those proceeds do not affect that purpose and thus do not conflict with the congressional intent underlying FEGLIA.

Id. at 6. (internal citations omitted).

The Supreme Court of Mississippi: In *McCord v. Spradling*, a widow contracted with her husband, the insured, in an antenuptial agreement to "waive and release any and all of his or her interest in the property of the other, either as a surviving spouse or otherwise." *McCord*, 830 So. 2d at 1190-1191. Nevertheless, the widow applied for and received the insured's FEGLI policy proceeds after his death. *Id.* at 1191. The insured's estate and his children from a prior marriage sued the widow claiming she breached the antenuptial agreement. *Id.* at 1192. The Supreme Court of Mississippi held that FEGLIA did not preempt a breach of contract claim seeking entitlement to the insurance proceeds from a FEGLI policy after they had been paid to the widow. *Id.* at 1193.

The Court of Appeals of Texas: In *Fagan v. Chaisson*, an ex-wife sued a widow for a portion of FEGLI policy proceeds the widow received following the death of the insured on the grounds that the ex-wife was entitled to the insurance proceeds under a property settlement agreement. *Fagan*, 179 S.W.3d at 38-41. The Court of Appeals of Texas stated that "we join the majority of state courts that have addressed this issue and hold that FEGLIA does not preempt the power of state courts to impose a

constructive trust on FEGLIA insurance proceeds." *Id.* at 42. *See also Roberts v. Roberts*, 560 S.W.2d 438 (Tex. Civ. App. 1977).

The Superior Court of New Jersey, Appellate Division: In *Sedarous v. Sedarous*, a married couple were in the middle of a divorce, when the husband died. *Sedarous*, 285 N.J. Super. at 319-320. The husband's sister was the designated beneficiary under husband's FEGLI policy. *Id.* at 319. Following husband's death, wife sued the sister seeking to have a constructive trust imposed over the insurance proceeds. *Id.* 320. The trial court granted sister's motion for summary judgment on the grounds that FEGLIA preempted such an equitable remedy. *Id.* The Superior Court of New Jersey, Appellate Division found that "while Congress has surely occupied the field of federal employee group insurance up to the point of payment of proceeds, FEGLIA, in our view, does not reach beyond that point." *Id.* at 327. Accordingly, the court held that "federal law does not preclude [a state court] from imposing a constructive trust on FEGLIA proceeds." *Id.*

The Superior Court of Pennsylvania: In *Eonda v. Affinito*, an insured had agreed in a Comprehensive Marriage Settlement Agreement to designate his son as the beneficiary of his life insurance policies. *Eonda*, 427 Pa. Super. at 319. However, the insured changed the beneficiary designation of his FEGLI policy to Jeannene Affinito prior to his death. *Id.* The son brought an unjust enrichment claim against Affinito based on his father's breach of the

agreement. *Id.* The Superior Court of Pennsylvania stated that

> we are confident that Congress did not intend that the vast number of federal employees in this country be permitted to enter into voluntary, state court-sanctioned agreements concerning the care and welfare of their children and then shirk completely the duties imposed by those agreements. The federal interest in doing so is far too minimal and the damaging impact to state domestic relations law far too grave.

Id. at 325-326. Accordingly, the court held that FEGLIA did not preempt a claim against insurance proceeds after the funds had been paid to the designated beneficiary. *Id.* at 321-325.

The Missouri Court of Appeals: In *Kidd v. Pritzel*, the insured agreed in a property settlement agreement to maintain his children from the marriage as the beneficiaries of his FEGLI policy. *Kidd*, 821 S.W.2d at 567. Thereafter, he designated his two sisters as the beneficiary of his policy. *Id.* He also wrote in his will that his sisters were to hold the FEGLI policy proceeds in trust for the benefit of his children. *Id.* The sisters retained the policy proceeds for their own benefit. *Id.* The children sued the sisters to recover the FEGLI proceeds. *Id.* The trial court ruled that the children's claims were barred by FEGLIA. *Id.* at 568. The Missouri Court of Appeals found that while "§ 8705 serves a valuable and worthwhile purpose of keeping the [Office of Personnel Management (OPM)] and the insurance company out of legal entanglements" it

does not bar equitable claims once the proceeds have been paid to the beneficiary. *Id.* at 572. The court then went on to hold that the children's equitable claims were not preempted by FEGLIA. *Id.* at 575.

The Appellate Court of Illinois: In *In re Estate of Anderson*, the insured and his widow entered into a prenuptial agreement in which the widow waived her rights to the proceeds from the insured's life insurance as surviving spouse. *In re Estate of Anderson*, 195 Ill. App. 3d 644, 645-647 (1990). The insured did not have a designated beneficiary for his FEGLI policy, so the widow was entitled to receive the proceeds from this policy under 5 U.S.C. § 8705(a). *Id.* at 648. The executors of the insured's estate sued the widow to recover the insurance proceeds. *Id.* Regarding the question of federal preemption, the Appellate Court of Illinois found "that Congress, when enacting the current provisions in section 8705(a), intended to alleviate the administrative difficulties previously suffered by the Civil Service Commission and the insurance companies when paying death benefits and to avoid serious delay in paying these benefits to the survivors of Federal employees." *Id.* at 653. Therefore, the court held that 5 U.S.C. § 8705(a) "does not preclude a third party from bringing an action against the payee to compel payment of the proceeds to another party properly entitled to the proceeds." *Id.*

The Court of Appeals of North Carolina: In *Barden v. Metro. Life Ins. Co.*, the insured agreed in a property settlement agreement to maintain his soon to be ex-wife as the beneficiary of his FEGLI

policy. *Barden v. Metro. Life Ins. Co.*, 41 N.C. App. 135, 136-137 (1979). The insured then remarried and designated his new wife as the beneficiary. *Id.* at 137. After his death, the ex-wife sued the insurance company and the new wife for the FEGLI proceeds. *Id.* at 136. The Court of Appeals of North Carolina found that "compliance with the procedure set out in 5 U.S.C. § 8705(a) does not as a matter of law automatically entitle the person so designated to the proceeds." *Id.* at 138. Therefore, the court ruled that the ex-wife was entitled to the FEGLI proceeds in accordance with the property settlement agreement. *Id.* at 139.

The Court of Appeals of Kentucky: In *Bell v. Bell*, the insured originally designated his ex-wife as the beneficiary of his FEGLI policy. *Bell v. Bell*, 2009 WL 350607, 1-2 (Ky. App. Unpub.). The insured remarried but never properly changed his beneficiary designation. *Id.* at 2. After the insured's death, his widow sued his ex-wife for the insured's FEGLI proceeds claiming that the insured intended to change his beneficiary designation to his widow, but mistakenly filled out the wrong form. *Id.* In addressing the issue of whether FEGLIA preempted an equitable claim against the ex-wife for the insurance proceeds, the Court of Appeals of Kentucky found that

> Congress' intent in amending the FEGLI was to prevent clogging of the federal courts for challenges to the designated beneficiary. Allowing a family member to sue in state court does not in anyway conflict with this intention, and in fact, it gives federal employees' family members the same rights

> they would have were their loved ones not employed by the federal government.

Id. at 4. Accordingly, the court held that FEGLIA did not preempt state courts from granting equitable remedies. *Id.* at 4-5.

B. The Only Other State Court To Hold That FEGLIA Preempted A State Equitable Remedy Was Alabama.

The only other state court to find that FEGLIA preempted a state equitable remedy was the Supreme Court of Alabama. *Metro. Life Ins. Co. v. Potter*, 533 So. 2d 589 (Ala. 1988). However, this case does not necessarily speak to the issue of whether or not the recipient of FEGLI proceeds could be sued after the recipient had received the funds.

In *Metro. Life Ins. Co. v. Potter*, the insured was ordered in a state court divorce proceeding to maintain his ex-wife as the beneficiary of his FEGLI policy. *Id.* at 591. However, the insured subsequently changed his beneficiary designation to his son, his brother and a friend. *Id.* The life insurance company received competing claims for the insurance proceeds. *Id.* The Supreme Court of Alabama found that "[i]f the divorce judgment is deemed to control payment of the FEGLI proceeds, then it conflicts with the federal statutory order of precedence, 5 U.S.C. § 8705(a)." *Id.* at 593. However, since this was a suit against the insurance company to direct that the proceeds be paid to the ex-wife instead of to the designated beneficiaries, it

did not necessarily address whether the ex-wife could have maintained a suit against the designated beneficiaries once the proceeds had been paid.

C. The Large Majority Of Federal Courts, In Contrast To The Large Majority Of State Courts, Have Held That FEGLIA Preempts State Domestic Relations Equitable Remedies.

Several federal courts have addressed the issue of whether FEGLIA preempts state domestic relations equitable remedies and almost all of them have found for preemption.

United States Court of Appeals, Eleventh Circuit: In *O'Neal v. Gonzalez*, the insured agreed to name his friend as the beneficiary of his FEGLI policy in exchange for consideration. *O'Neal v. Gonzalez*, 839 F.2d 1437, 1438 (11th Cir. 1988). However, the insured designated his aunt as 90% beneficiary of his FEGLI policy instead. *Id.* The friend sued the insurance company and the aunt for the proceeds. *Id.* at 1439. Even though the Eleventh Circuit was dealing with the situation where the insurance company was being sued before the proceeds were distributed, it addressed the issue of "whether a constructive trust benefitting a non-designated person may be imposed upon proceeds of the FEGLIA policy once payment has been made to the designated beneficiary." *Id.* The court ruled that such remedies were preempted. *Id.* at 1440.

United States Court of Appeals, First Circuit: In *Metro. Life Ins. Co. v. Zaldivar*, a divorce decree required the insured to maintain his children from his first marriage as the beneficiaries of his FEGLI policy. *Metro. Life Ins. Co. v. Zaldivar*, 413 F.3d 119, 120 (1st Cir. 2005). Nevertheless, the insured changed his beneficiary designation to his second wife prior to his death. *Id.* The First Circuit determined that this Court's opinion in *Ridgway v. Ridgway*, 454 U.S. 46 (1981), which dealt with the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"), controlled the case and held that the children's claim was barred. *Id.* at 120-121.

United States Court of Appeals, Seventh Circuit: In *Metro. Life Ins. Co. v. Christ*, a divorce decree ordered the insured to maintain his children as the beneficiaries of his FEGLI policy. *Metro. Life Ins. Co. v. Christ*, 979 F.2d 575, 576 (7th Cir. 1992). However, the insured never designated anyone as the beneficiary of his FEGLI policy. *Id.* At the time of his death, the insured had remarried. *Id.* Both the guardian of his children and his widow filed competing claims with the insurance company for the proceeds. *Id.* "MetLife, in turn, filed an interpleader action . . . to determine the proper beneficiary." *Id.* The Seventh Circuit found that "Congress in FEGLIA has spoken 'with force and clarity' in directing to whom insurance benefits are to be paid." *Id.* at 582. "[I]f Congress chooses to favor administrative efficiency over more equitable considerations, it is not our place to second guess or try to bypass that decision." *Id.* Therefore, the court held that FEGLIA preempted state domestic relations equitable remedies which required

insurance proceeds to be paid to someone other than in accordance with 5 U.S.C. § 8705(a). *Id.* However, since this case was dealing with FEGLI proceeds before they had been distributed, the court did not hold that an action could not be brought against the recipient of the proceeds after they had been paid out.

Federal District Courts which have ruled similarly include: *Metro. Life Ins. Co. v. Barber*, No. Civ.A.5:01-CV-025-C, 2001 WL 1683253 (N.D. Tex. 2001); *Metro. Life Ins. Co. v. Bell*, 924 F. Supp. 63 (E.D. Tex. 1995); *Metro. Life Ins. Co. v. Armstrong-Lofton*, 19 F. Supp. 2d 1134 (C.D. Cal. 1998); *Mercier v. Mercier*, 721 F. Supp. 1124 (D. N.D. 1989); *Metro. Life Ins. Co. v. Pearson*, 6 F. Supp. 2d 469 (D. Md. 1998); *But see Fernbaugh v. Metro. Life Ins. Co.*, CV-06-1361, 2006 U.S. Dist. LEXIS 67765 (M.D. Pa. Sept. 21, 2006) (FEGLIA did not preempt a state law equitable claim).

II. THIS COURT HAS EXPRESSLY RECOGNIZED THAT THE QUESTION PRESENTED IS AN IMPORTANT UNRESOLVED ISSUE.

In *Kennedy v. Dupont Savings and Investment Plan*, William Kennedy was a participant in a savings and investment plan (SIP), with power both to 'designate any beneficiary or beneficiaries to receive all or part' of the funds upon his death, and to 'replace or revoke such designation.'" *Kennedy*, 129 S. Ct. at 868. During his marriage to Liv Kennedy, William designated her as the beneficiary of his SIP. *Id.* at 869. When William and Liv

divorced, a divorce decree divested Liv of her rights in the SIP. *Id.* However, William never changed his beneficiary designation. *Id.* After William's death, the SIP plan administrator paid the SIP death benefit to Liv in accordance with William's beneficiary designation. *Id.* William's "[e]state then sued [his employer] and the SIP plan administrator . . . claiming that the divorce decree amounted to a waiver of the SIP benefits on Liv's part, and that [his employer and the SIP plan administrator] had violated ERISA by paying the benefits to William's designee." *Id.*

This Court held "that the plan administrator did its statutory ERISA duty by paying the benefits to Liv in conformity with the plan documents." *Id.* at 875. However, in doing so, this Court specifically stated that "we [do not] express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed." *Id.* at n. 10.

This Court has consistently ruled that plan benefits need to be paid in accordance with plan documents in order to alleviate the difficulties with which plan administrators, insurance companies, etc. would otherwise have to contend. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 149-150 (2001) ("Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimizing the administrative and financial burdens' on plan administrators.") (internal citations omitted). However, this Court has also recognized that the issue of whether federal law preempts state

equitable remedies after benefits have been paid, has not been, but needs to be addressed (and some would say that *Kennedy*, 129 S. Ct. at 875, n. 10 is an invitation to bring this issue before this Court).

III. THE QUESTION PRESENTED REQUIRES THIS COURT'S IMMEDIATE ATTENTION AND THIS CASE PRESENTS A HIGHLY SUITABLE VEHICLE FOR RESOLVING IT.

Until this Court addresses the question presented, litigation regarding FEGLIA preemption will expand at a rapid pace as more and more states adopt UNIF. PROBATE CODE § 2-804(h)(2). Up to now, all of the cases that have addressed whether FEGLIA preempts state equitable remedies have arisen because an insured failed to maintain someone as the beneficiary of a FEGLI policy as required by a divorce decree, property settlement agreement, etc. or an ex-spouse waived a right to be a beneficiary of FEGLI proceeds in a property settlement agreement, etc. While this alone has already created significant nationwide litigation for grieving families, the new line of statutes being adopted in accordance with UNIF. PROBATE CODE § 2-804(h)(2) significantly increases the potential for litigation.

In this case, the statute in question is VA. CODE ANN. § 20-111.1(D). This Virginia code section is based on UNIF. PROBATE CODE § 2-804(h)(2), which reads as follows:

> (2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

UNIF. PROBATE CODE § 2-804(h)(2).[1] Twelve states (Alaska, Colorado, Hawaii, Massachusetts, Michigan, Montana, New Mexico, North Dakota, South Dakota, Utah, Virginia and Wisconsin) have already enacted laws based on § 2-804(h)(2).[2]

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[1] The relevant part of UNIF. PROBATE CODE § 2-804 to which § 2-804(h)(2) speaks is § 2-804(b). § 2-804(b) revokes a beneficiary designation upon divorce. UNIF. PROBATE CODE § 2-804(b) (amended 2008).

[2] Alaska, ALASKA STAT. § 13.12.804(i) (2012); Colorado, COLO. REV. STAT. § 15-11-804(8)(b) (2011); Hawaii, HAW. REV. STAT. § 560:2-804(h)(2) (2011); Massachusetts, MASS. GEN. LAWS ch. 190B, § 2-804(h)(2) (2011); Michigan, MICH. COMP. LAWS § 700.2809 (2012); Montana, MONT. CODE ANN. § 72-2-814(8)(b) (2011); New Mexico, N.M. STAT. ANN. § 45-2-804(I) (2012); North Dakota, N.D. CENT. CODE § 30.1-10-04(8)(b) (2011); South Dakota, S.D. CODIFIED LAWS § 29A-2-804(h)(2) (2011); Utah, UTAH CODE ANN. § 75-2804(8)(b) (2012); Virginia, VA. CODE ANN. § 20-111.1(D); and Wisconsin, WIS. STAT. § 854.26 (2011).

This is the first case to come before this Court under this new line of statutes which give a widow, child or whoever would have been entitled to FEGLI insurance proceeds a cause of action against an ex-spouse when federal law preempts a state law automatic revocation of an ex-spouse as the beneficiary of insurance policies upon divorce. All that is now needed for a cause of action to raise this preemption question is the much more common occurrence of a divorced current or former federal employee who fails to change the beneficiary designation of his or her FEGLI policy away from an ex-spouse.

The National Conference of Commissioners on Uniform State Laws clearly was responding to this Court's opinions in *Egelhoff* and *Kennedy* which both held that ERISA benefits needed to be paid to designated beneficiaries for administrative convenience purposes. *Egelhoff*, 532 U.S. at 149-150; *Kennedy*, 129 S. Ct. at 875-876.

> Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate

> transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

UNIF. PROBATE CODE § 2-804 cmt. (amended 2008). While this comment speaks directly to ERISA, the same logic applies to FEGLIA. But, regardless of whether or not § 2-804(h)(2) or its comment were intended to apply to FEGLIA cases, the fact of the matter is that § 2-804(h)(2) does apply in FEGLIA cases if it is not preempted.

Undoubtedly, more states will follow the recommendation of the National Conference of Commissioners on Uniform State Laws over time. Given the high divorce rate[3] and large number of current[4] and former federal employees in this country, until this Court resolves the question presented, this type of litigation will surely grow at an accelerated pace.

This case presents a perfect vehicle for this Court to resolve the question presented. In this case, this Court can squarely address the issue of whether state equitable actions can be brought against the beneficiaries of FEGLI policies after the policy benefits have been distributed. Through this case,

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[3] 40% - 50% of marriages in the United States end in divorce. DivorceRate.org Home Page, http://www.divorcerate.org.

[4] According to the United States Census Bureau, as of March 2010, there are over 2.5 million fulltime federal employees. US Census Bureau, Federal Government Civilian Employment By Function: March 2010, http://www2.census.gov/govs/apes/10fedfun.pdf.

this Court can create a clear and concise rule which will apply whether the action arose under a divorce decree, property settlement agreement, statute or otherwise, and bring all of the state courts and federal courts in line with one another. Regardless of how this Court rules on this matter, this Court will bring clarity to grieving families across this country and put an end to this nationwide unnecessary and expansive litigation.

A ruling on the question presented would also be highly persuasive, if not binding, to similar employee benefits cases that are governed by ERISA. If this Court holds that such equitable remedies are permitted in FEGLIA cases, it would be hard to come up with a sustainable argument as to why such remedies would not be permitted in ERISA cases.

IV. THE SUPREME COURT OF VIRGINIA'S OPINION IS WRONG ON THE MERITS.

The Supreme Court of Virginia wrongly determined that FEGLIA preempts VA. CODE ANN. § 20-111.1(D).

A. Preemption Generally

Whether federal law preempts state law depends on congressional intent. *FMC Corp. v. Holliday*, 498 U.S. 52, 56 (1990). VA. CODE ANN. § 20-111.1(D) is a state domestic relations equitable remedy. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)

(quoting *In re Burrus*, 136 U.S. 586, 593-594 (1890)). "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Id.* (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)). "There is indeed a presumption against pre-emption in areas of traditional state regulation such as family law." *Egelhoff*, 532 U.S. at 151. "[C]ongressional intent to supersede state laws [in this area] must be 'clear and manifest.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). "A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo*, 439 U.S. at 581 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

B. FEGLIA Does NOT Preempt VA. CODE ANN. § 20-111.1(D).

The Supreme Court of Virginia based its holding that FEGLIA preempts VA. CODE ANN. § 20-111.1(D) on this Court's opinion in *Ridgway*, which dealt with SGLIA. In *Ridgway*, Army Sergeant Ridgway was insured by a Servicemen's Group Life Insurance ("SGLI") policy which is governed by SGLIA. *Ridgway*, 454 U.S. at 46. As part of Sergeant Ridgway's divorce, the Maine court ordered him to maintain his children as the beneficiaries of his SGLI policy. *Id.* at 48. After his divorce, Sergeant

Ridgway changed his beneficiary designation so that the proceeds from his SGLI policy would go to his new wife under the statutory order of precedence in SGLIA (which is very similar to the statutory order of precedence in FEGLIA). *Id.* Sergeant Ridgway's ex-wife sued the insurance company on behalf of her children seeking to have the proceeds of the SGLI policy placed in a constructive trust for the benefit of his children. *Id.* at 49.

In *Ridgway*, this Court determined that under SGLIA "the insured service member possesses the right freely to designate the beneficiary and to alter that choice at any time. . " *Id.* at 56. The divorce decree purported to restrict that right. Accordingly, this Court held "that the controlling provisions of SGLIA prevail over and displace inconsistent state law" (i.e., the divorce decree). *Id.* at 60. However, the Supreme Court of Virginia erred when it applied this Court's analysis of SGLIA to FEGLIA.

1. The differing purposes behind SGLIA (to improve the morale of servicemen in the interests of national defense) and FEGLIA (to avoid administrative difficulties and delays in payment) compel a finding that *Ridgway* does not control FEGLI cases.

In *Ridgway*, this Court gave great weight to the congregational intent behind SGLIA. *Ridgway*, 454 U.S. at 56. It looked to the legislative history of

SGLIA which stated that a "serviceman may designate any person as a beneficiary." *Id.* This Court noted the strong federal purpose that

> [p]ossession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.

Id. at 56-57 (quoting *Wissner v. Wissner*, 338 U.S. 655, 660-661 (1950)). Conversely, the Congressional intent behind establishing FEGLIA was to offer life insurance to federal employees so that the federal government, in competing with private employers, was offering benefits in-line with (but not better than) "the best practices of progressive, private employers." *Kidd*, 821 S.W.2d at 568 (quoting 1954 U.S. Code Cong. & Admin.News, Volume 2 at 3056.). With regard to the specific FEGLIA provision in question, 5 U.S.C. § 8705(a), the Senate clarified that it had two reasons for establishing the order of precedence: 1) to avoid administrative difficulties; and 2) to avoid serious delays in paying insurance benefits to survivors. *See* S. Rep. No. 1064, 89th Cong.2d Sess. *reprinted in* 1966 U.S.C.C.A.N. 2070, 2071; *see also Kidd*, 821 S.W.2d at 569-570 (examining legislative history and subsequent amendments to 5 U.S.C. § 8705). "§ 8705 serves a valuable and worthwhile purpose by keeping the OPM and the insurance company out of legal

entanglements." *Kidd*, 821 S.W.2d at 572; *McCord*, 830 So. 2d at 1196 ("Congress intended to clarify beneficiary status for the benefit of insurers, not give the beneficiary a federally guaranteed title to the funds."); *Anderson*, 195 Ill.App.3d at 653 (In enacting 5 U.S.C. § 8705(a), Congress intended to alleviate difficulties experienced by the Civil Service Commission and the insurance companies. Congress did not intend to prevent suits against the payee of insurance after they have been paid the proceeds.).

The congressional intent behind FEGLIA has nothing to do with enhancing the morale of federal employees in the interests of national defense by guaranteeing that FEGLI proceeds are exempt from forfeiture or seizure in the hands of a beneficiary. *Sedarous*, 285 N.J. Super. at 325; *Kidd*, 821 S.W.2d at 568. If FEGLIA did so "the FEGLI system [would separate] federal employees from regular corporate employees, which is exactly what FEGLI was created to prevent." *Bell*, 2009 WL 350607, 4. Congressional intent is paramount to the question of preemption. *FMC Corp.*, 498 U.S. at 56. Given the clearly differing congressional intents behind the enactments of SGLIA and FEGLIA, *Ridgway* should not be used to stand for the proposition that Congress has expressed the required "clear and manifest" intent to preempt state domestic relations equitable remedies like the one contained in VA. CODE ANN. § 20-111.1(D) with regard to FEGLI benefits.

2. Congress's decision to exclude the anti-attachment provision when enacting FEGLIA, clearly shows, if not compels, a finding that Congress intended to permit enforcement of state equitable remedies after insurance proceeds have been distributed.

In *Ridgway*, this Court's first holding was that the insured must be free to designate and/or change the beneficiary of his SGLI policy at any time; and therefore, a state equitable remedy such as a divorce decree which restricted that right was preempted. *Ridgway*, 454 U.S. at 60. However, this Court also had a second holding in *Ridgway* in which this Court found grounds for preemption of the divorce decree. *Id.* at 60-63. In its analysis related to its second holding, this Court

> extensively discussed SGLIA's anti-attachment provision [38 U.S.C. § 1970(g)], which provided that SGLIA policy proceeds were exempt from creditors and "any 'attachment, levy, or seizure by or under any legal or equitable process whatever,' whether accomplished 'either before or after receipt by the beneficiary.'" Id. at 61. [This] Court found that a constructive trust on the SGLIA proceeds would operate as a prohibited

> "seizure" of SGLIA proceeds, in contravention of the anti-attachment provision. Id. at 60.

Hardy, 2012 WL 859698, 7.

Courts which have relied on the *Ridgway* case to find preemption in FEGLI cases have determined that both of *Ridgway's* two holdings (i.e., (i) that the insured has an absolute right to designate the beneficiary; and (ii) that the anti-attachment provision prevents a seizure or constructive trust to be placed on the insurance proceeds) independently stand for the proposition of preemption. *Maretta*, 722 S.E.2d at 38. ("State courts distinguishing *Ridgway* also fail to acknowledge . that its holding based on SGLIA's antiattachment provision was a separate independent basis for the result"); *Christ*, 979 F.2d at 581 ("SGLIA unlike FEGLIA, contained an anti-attachment provision. . . . But that fact was a separate ground for holding that SGLIA preempted the divorce decree."). These courts then dismiss the lack of an anti-attachment provision in FEGLIA as irrelevant and solely focus on *Ridgway's* first holding. *Maretta*, 722 S.E.2d at 38; *Christ*, 979 F.2d at 581.

Assuming that the first holding in *Ridgway* regarding the right to designate a beneficiary stands for the proposition that one cannot bring an action against SGLI insurance proceeds after they have

been paid,[5] these courts still miss the meaning of the lack of an anti-attachment provision in FEGLIA. The importance is not that the first holding in *Ridgway* can by itself stand for the proposition that SGLIA preempts equitable remedies. The significance is that the lack of an anti-attachment provision in FEGLIA is a purposeful act by Congress to have a different rule apply to FEGLI policies.

"[B]oth FEGLIA and SGLIA contain identical 'order of precedence' provisions". *Maretta*, 722 S.E.2d at 35. However, when Congress enacted FEGLIA, it specifically excluded the anti-attachment provision which is in SGLIA. As this Court so aptly stated in *Ridgway* when discussing its second holding, "[a] result of this kind, of course, may be avoided if Congress chooses to avoid it." *Ridgway*, 454 U.S. at 63. If Congress had intended to prevent all equitable claims against beneficiaries after

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[5] This is not a safe assumption. Since *Ridgway* did not deal with a claim against insurance proceeds after they had been distributed, either of *Ridgway's* two holdings was sufficient in that case to warrant preemption. However, as the trial court in this case determined, this Court's first holding in *Ridgway* regarding the right to designate a beneficiary only found that the state equitable remedy of requiring the insured to maintain his children as the beneficiary of his SGLI policy "conflicted with the express terms of SGLIA and injures federal objectives by interfering with the servicemember's 'absolute right to designate the policy beneficiary'." *Hillman*, 2010 WL 7373701, 4. Therefore, *Ridgway's* first holding only requires that benefits be paid in accordance with the statutory order of precedence and does not speak to whether an action could be brought against a beneficiary after benefits have been distributed. *Id.* Instead, only this Court's second holding regarding the anti-attachment provision prevents courts from enforcing state equitable remedies after the proceeds have been paid to the beneficiary in SGLIA cases. *Id.*

FEGLI proceeds had been distributed it would have treated FEGLI policies the same as SGLI policies by including an anti-attachment provision in FEGLIA. *See id.* However, Congress chose not to do so.

Congress's inclusion of the anti-attachment provision in SGLIA coupled with Congress's omission of a similar provision in FEGLIA should be viewed as Congress's purposeful act to make FEGLI proceeds vulnerable to state domestic relations causes of action after the proceeds have been distributed. *Hardy*, 2012 WL 859698, 8 ("Ultimately, the lack of an anti-attachment provision within the FEGLIA, the divergent purposes underscoring FEGLIA and SGLIA, and the 1998 amendment to section 8705 of FEGLIA compel us to conclude that *Ridgway* is not controlling here."); *McCord*, 830 So.2d at 1197 ("If Congress had desired to totally pre-empt all state law claims it would have included an anti-attachment provision to FEGLIA. *Ridgway* expressly stated that if Congress chose to avoid the result in that case, it could do so by enacting legislation which did not include an anti-attachment provision. That is precisely what Congress did when it enacted FEGLIA.") (quoting *Kidd*, 821 S.W.2d at 571); *Sedarous*, 285 N.J. Super. at 327 ("FEGLIA's lack of an anti-attachment provision is the critical factor justifying, if not indeed compelling, the conclusion that *Ridgway* does not govern the FEGLIA preemption issue."); *Fagan*, 179 S.W.3d at 45 ("the omission of an anti-attachment clause supports a conclusion that nothing in FEGLIA dictates the preemption of state law."); *See United States v. Bestfoods*, 524 U.S. 51, 62 (1998) ("against this venerable common-law backdrop, the

congressional silence is audible"); *Elkins v. Moreno*, 435 U.S. 647, 666 (1978) (absence of a reference to an immigrant's intent to remain a citizen of a foreign country is "pregnant" when contrasted with other provisions of a "comprehensive and complete" immigrant code); *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (congressional silence is evidence of congressional intent not to extend vicarious liability in an unusual manner under the Fair Housing Act of 1968.).

3. The 1998 amendment to FEGLIA which requires insurance proceeds to be paid in accordance with a properly filed divorce decree coupled with the exclusion of such an amendment in SGLIA clearly shows, if not compels, a finding that Congress did NOT intend to preempt all state equitable remedies in FEGLI cases.

Congress amended 5 U.S.C. § 8705 to include subsection (e) in 1998. 5 U.S.C. § 8705(e) specifically permits terms of a divorce decree, court-approved property settlement agreement, etc. to restrict an insured's right to designate and/or change a beneficiary designation. Congress has not included a similar amendment in SGLIA. *Hardy*, 2012 WL 859698, 8. Despite the undeniable fact that Congress set up a mechanism that, in certain circumstances, requires the proceeds from a FEGLI policy to be paid in accordance with a state domestic

relations equitable remedy (i.e., a divorce decree), the Supreme Court of Virginia found that in all cases Congress intended for FEGLI benefits to belong to the designated beneficiary to the exclusion of all others. *Maretta*, 722 S.E.2d at 35-37. This finding simply defies logic.

The inclusion of 5 U.S.C. § 8705(e) is in line with Congress's intent to keep the administration of FEGLI policies easy for OPM and the insurance company. It also undeniably demonstrated that Congress intended to permit state domestic relations equitable remedies which restrict the insured's right to name a beneficiary of a FEGLI policy. Finally, the lack of such a provision in SGLIA clearly shows, if not compels, a finding that Congress intended to treat FEGLI policies and SGLI policies differently in this regard. *Hardy*, 2012 WL 859698, 8.

4. 5 U.S.C. § 8709(d)(1) does not preempt VA. CODE ANN. § 20-111.1(D).

The Supreme Court of Virginia determined that 5 U.S.C. § 8709(d)(1) applied to the statutory provisions in FEGLIA. *Maretta*, 722 S.E.2d at 33, n. 1. ("The 'contractual provisions' referenced in 5 U.S.C. § 8709(d)(1) with which state law must be consistent are simply the provisions of FEGLIA."). Therefore, in interpreting the preemptive power of 5 U.S.C. § 8705(a), that court applied the express preemption language of 5 U.S.C. § 8709(d)(1) thereto. *Id.* at 1.

5 U.S.C. § 8709(d)(1) provides

> (d)(1) The provisions of ***any contract*** under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

§ 8709(d)(1) (emphasis added). § 8709(d)(1) "renders preemptive contract terms . . ., not provisions enacted by Congress." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006) (discussing the almost identical statute contained in 5 U.S.C. § 8902(m)(1) of the Federal Employees Health Benefits Act of 1959 (FEHBA)); *Fernbaugh*, 2006 U.S. Dist. LEXIS 67765 ("FEGLIA's clause preempts state laws inconsistent with the terms of a FEGLI Policy while the ERISA clause preempts state law that conflicts with any of its statutory sections."). By its express terms, 5 U.S.C. § 8709(d)(1) does not apply to 5 U.S.C. § 8705(a), any other section of FEGLIA or any federal regulations promulgated thereunder.

The Supreme Court of Virginia refused to acknowledge the 50 page contract which OPM negotiated with Metropolitan Life Insurance

Company.[6] Therefore, the Supreme Court of Virginia could not have possibly applied 5 U.S.C. § 8709(d)(1) in this case properly, since the court did not in the first place accept the existence of the contract to which 5 U.S.C. § 8709(d)(1) speaks.

This Court has already determined that a narrow and "modest reading" is in order for a provision that "declares no federal law preemptive, but instead, terms of [a] . . . negotiated contract." *McVeigh*, 547 U.S. at 698; *see Fernbaugh*, 2006 U.S. Dist. LEXIS 67765. Furthermore, this Court has already determined that virtually identical language to that contained in 5 U.S.C. § 8709(d)(1) is not sufficient in and of itself to preempt all state law relating to FEGLIA. *McVeigh*, 547 U.S. at 697-99 (An almost identical statute contained in the Federal Employees Health Benefits Act of 1959 "does not purport to render inoperative any and all state laws that in some way bear on federal employee-benefit plans."); *see also Egelhoff*, 532 U.S. at 146 ("[W]e have recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes preemption would never run its course.'") (citation omitted). Therefore, the congressional intent regarding the scope and breadth of 5 U.S.C. § 8709(d)(1) cannot be determined solely by looking at the statutory language, but should be gleaned from legislative history.

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[6] A copy of this contract is easily obtainable from OPM through a FOIA request. Counsel is happy to provide such a copy to this Court if so requested.

The House Report regarding 5 U.S.C. § 8709(d)(1) explains that this provision of FEGLIA was enacted "to eliminate all possibility of a conflict between Sections 7 and 8 of this Bill, increasing levels of optional group life insurance available to employees, and any provision of state law limiting the amount of insurance which may be provided under a group insurance contract to citizens of the state." H.R. Rep. No. 96-120, 1980 U.S.C.C.A.N. 3867. 5 U.S.C. § 8709(d)(1) "is only concerned with conflicts between state regulation of group life insurance programs and the express contractual provisions contained in FEGLIA policies. This section is not concerned with state law claims brought once the proceeds of a policy are paid out." *McCord*, 830 So. 2d at 1198 (citation omitted); *Kidd*, 821 S.W.2d at 573 ("It must be assumed that Congress was merely clarifying its intent to relieve administrative difficulties when a conflict arose between state insurance regulations pertaining to group life insurance programs and the expressed contractual provisions of FEGLIA policies."); *Sedarous*, 285 N.J. Super. at 325.

The stated congressional intent clearly shows that 5 U.S.C. § 8709(d)(1) was not directed at state domestic relations equitable remedies. Given the narrow and modest reading to be applied to 5 U.S.C. § 8709(d)(1), it should not be interpreted to expressly preempt such remedies.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully, submitted.

Daniel H. Ruttenberg
Counsel of Record
SmolenPlevy
8045 Leesburg Pike, Fifth Floor
Vienna, VA 22182
dhruttenberg@smolenplevy.com
703.790.1900

Counsel for Petitioner

April 11, 2012

APPENDIX

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Supreme Court of Virginia.
Judy A. MARETTA
v.
Jacqueline HILLMAN.

Record No. 102042.
Jan. 13, 2012.

**32 George O. Peterson (Tania M. L. Saylor; Peterson Saylor, on briefs), for appellant.

Daniel H. Ruttenberg (SmolenPlevy, on brief), Vienna, for appellee.

Present: All the Justices.

**33 OPINION BY Chief Justice CYNTHIA D. KINSER.

*37 Judy A. Maretta (Maretta), as the named beneficiary of a Federal Employees' Group Life Insurance (FEGLI) policy, received FEGLI benefits upon the death of her ex-husband. The question on appeal is whether federal law preempts Code § 20–111.1(D), which otherwise would make Maretta liable to her ex-husband's widow, Jacqueline Hillman (Hillman), for those benefits.

*38 In the event of a decree of annulment or divorce from the bond of matrimony, Code § 20–111.1(A) revokes "any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party." However, Code § 20–111.1(D), the subsection at issue, provides that

> [if Code § 20–111.1(A)] is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

In contrast to these statutory provisions, the Federal Employees' Group Life Insurance Act (FEGLIA), 5 U.S.C. § 8701 et seq. (2006 & Supp. II 2008), contains an order of precedence that directs to whom benefits under a FEGLI policy are paid:

> [T]he amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:

> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office....
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee.

5 U.S.C. § 8705(a). FEGLIA also contains a preemption provision, which states:

> The provisions of any contract under this chapter [5 U.S.C. § 8701 et seq.] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which ***39** relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

5 U.S.C. § 8709(d)(1).[1]

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[1] The "contractual provisions" referenced in 5 U.S.C. § 8709(d)(1) with which state law must be consistent are simply the provisions of FEGLIA. *See O'Neal v. Gonzalez*, 839 F.2d 1437, 1440 (11th Cir.1988) (noting that the insurance policy is not a traditional contract between an insured and the insurer but a federal policy governed by federal law). Section 8709(d)(1) "broadly preempts any state law that is inconsistent with the FEGLIA master policy." *Metropolitan Life Ins. Co. v. Christ*, 979 F.2d 575, 579 (7th Cir.1992).

Because Congress intended for FEGLI benefits to be paid and to belong to a designated beneficiary, we conclude that FEGLIA preempts Code § 20–111.1(D). Therefore, we will reverse the circuit court's judgment.

FACTS AND PROCEEDINGS

The relevant facts are not in dispute. In December 1996, Warren Hillman (Warren) named Maretta, his wife at the time, as the beneficiary of his FEGLI policy. The two divorced in December 1998 and Warren married Hillman in October 2002. Warren, however, never changed the beneficiary designation in his FEGLI policy. Hillman and Warren were still married when, in July 2008, Warren died. After her husband's death, Hillman filed a claim for benefits under Warren's FEGLI policy but was told the proceeds would be distributed to Warren's designated beneficiary, Maretta. Maretta filed a claim for and received the death benefits under the FEGLI policy in the amount of $124,558.03.

Hillman then filed an action against Maretta, claiming that pursuant to Code § 20–111.1(D), Maretta was liable to her for the death benefits received as the beneficiary of Warren's FEGLI policy. Hillman sought an **34 order directing Maretta to pay those proceeds to Hillman or, alternatively, a judgment against Maretta in the amount received from the FEGLI policy. Maretta filed a demurrer and plea in bar. Citing numerous federal cases, Maretta claimed that Code §§ 20–111.1(A) and –111.1(D) are preempted by 5 U.S.C. §§

8705 and 8709 because the state statutes grant FEGLI benefits to someone other than the named beneficiary in violation of FEGLIA's terms. In a letter opinion, the circuit court overruled Maretta's demurrer and plea in bar, concluding that Code § 20–111.1(D) is not preempted by FEGLIA. Hillman then moved for summary judgment. Finding no material*40 facts in dispute, the circuit court granted Hillman's motion and entered judgment against Maretta in the amount of $124,558.03.

We granted Maretta this appeal. The sole issue is whether the circuit court erred in determining that Hillman's claim under Code § 20–111.1(D) is not preempted by FEGLIA. That issue is a question of law reviewed de novo on appeal. *See Johnson v. Hart*, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010).

ANALYSIS

[1][2] The Supremacy Clause in the United States Constitution provides that the laws of the United States "shall be the supreme law of the land ... any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, state laws in conflict with federal law are "without effect." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008) (internal quotation marks omitted). The preemption doctrine "has its roots" in the Supremacy Clause and "requires us to examine congressional intent." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). " '[T]he purpose of Congress is

the ultimate touchstone' in every pre-emption case." *Altria Group*, 555 U.S. at 76, 129 S.Ct. 538 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)).

[3][4][5][6] "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *de la Cuesta*, 458 U.S. at 152–53, 102 S.Ct. 3014 (internal quotation marks omitted). Even when Congress has stopped short of totally displacing state law in a specific area, state law is nevertheless preempted "to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 153, 102 S.Ct. 3014 (citations and internal quotation marks omitted); *see also*, *Dugan v. Childers*, 261 Va. 3, 8, 539 S.E.2d 723, 725 (2001) (" 'The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.' ") (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979)); *Metropolitan Life Ins. Co. v. Potter*, 533 So.2d 589, 591 (Ala.1988) ("Preemption may occur from explicit preemptive language in a statute, from implied congressional intent, *41 or where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."). While there is a presumption against

preemption "in areas of traditional state regulation such as family law," *Egelhoff v. Egelhoff*, 532 U.S. 141, 151, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), "[the] relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Ridgway v. Ridgway*, 454 U.S. 46, 54, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981) (internal quotation marks omitted).

[7][8] In addition to the order of precedence set forth in 5 U.S.C. § 8705(a) and the preemption provision in 5 U.S.C. § 8709(d)(1), FEGLIA and the regulations promulgated thereunder contain provisions relevant to the specific preemption question before us. Pursuant to 5 C.F.R. § 870.802(f), an insured under a FEGLI policy can change his or her beneficiary "at any time without the knowledge or consent of the **35 previous beneficiary. This right cannot be waived or restricted."[2] *Id.* The insured's beneficiary designation takes precedence over any court order for divorce, annulment, or separation unless that order has been received by the appropriate office prior to the insured's death. 5 U.S.C. § 8705(e); 5 C.F.R. § 870.801(d). In addition, any "designation, change, or cancellation of beneficiary in a will or any other document not witnessed and filed as required by [5 C.F.R. § 870.802] has no legal effect with respect to [FEGLI] benefits." 5 C.F.R § 870.802(c).

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[2] "Federal regulations have no less pre-emptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014.

Contrary to these provisions, Code § 20–111.1(A) revokes a beneficiary designation upon entry of a decree of annulment or divorce from the bond of matrimony and thus alters the order of precedence in 5 U.S.C. § 8705(a), which directs payment of FEGLI benefits first to the designated beneficiary regardless of marital status. As the parties acknowledged before the circuit court, FEGLIA preempts Code § 20–111.1(A). *See Metropolitan Life Ins. Co. v. Bell*, 924 F.Supp. 63, 65 (E.D.Tex.1995) (holding that 5 U.S.C. § 8709(d)(1) "certainly preempts any direct payment to anyone other than a listed beneficiary when a beneficiary is actually designated").

Unlike Code § 20–111.1(A), Code § 20–111.1(D) does not alter the direct payment of FEGLI benefits to a designated beneficiary. Instead, it grants a third party the right to recover those benefits *42 from a designated beneficiary who is the former spouse of the insured. Code § 20–111.1(D). If Congress intended for FEGLI benefits to belong to the designated beneficiary to the exclusion of all others, then Code § 20–111.1(D) "stands as an obstacle to the accomplishment and execution of the full power and objectives of Congress" and is therefore preempted by FEGLIA. *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014.

Hillman argues, and courts have generally agreed, that FEGLIA manifests a congressional intent for administrative convenience. *See, e.g., Kidd v. Pritzel*, 821 S.W.2d 566, 569–70 (Mo.Ct.App.1991) (holding that purpose of 5 U.S.C. § 8705 is "to provide for the speedy and economical settlement of

claims") (citing cases); *cf.* *Egelhoff*, 532 U.S. at 148, 121 S.Ct. 1322 (stating that the principal goal of Employee Retirement Income Security Act is to provide "a set of standard procedures to guide processing of claims and disbursement of benefits") (internal quotation marks omitted). But many courts have concluded that Congress also intended to grant an insured the right to name without restriction, and to the exclusion of all others, the person who will receive the benefits from a FEGLI policy. *See, e.g.*, *Metropolitan Life Ins. Co. v. Zaldivar*, 413 F.3d 119, 120–21 (1st Cir.2005) (FEGLIA preempts the imposition of a constructive trust on FEGLI proceeds once paid); *Metropolitan Life Ins. Co. v. Christ*, 979 F.2d 575, 578–79 (7th Cir.1992) (same); *O'Neal v. Gonzalez*, 839 F.2d 1437, 1440 (11th Cir.1988) ("Congress intended to establish ... for the benefit of designated beneficiaries, an inflexible rule that the beneficiary ... would receive the policy proceeds, regardless of other documents or the equities in a particular case."). Most relevant is the decision of the Supreme Court of the United States in *Ridgway*. Although *Ridgway* involved the Servicemen's Group Life Insurance Act (SGLIA), both FEGLIA and SGLIA contain identical "order of precedence" provisions. *Compare* 5 U.S.C. § 8705(a) *with* 38 U.S.C. § 1970(a). Regulations promulgated pursuant to SGLIA are also similar to those under FEGLIA. *See* 38 C.F.R. § 9.4(3)(b) (change in beneficiary may be made at any time). We thus agree with those courts that have considered *Ridgway* to be "highly persuasive, if not binding, in construing [FEGLIA]." *See* *Zaldivar*, 413 F.3d at 120 (citing cases in support).

In *Ridgway*, the insured serviceman named his wife as the beneficiary of his SGLIA benefits. 454 U.S. at 48, 102 S.Ct. 49. When the parties subsequently obtained a divorce, the state-law judgment ordered the *43 insured to keep in force any existing life insurance policies for the benefit of his children. *Id.* The insured remarried and, contrary**36 to the command of the divorce order, changed the policy's beneficiary designation so that the proceeds would be paid pursuant to the statutory order of precedence set forth in 38 U.S.C. § 770(a), i.e., to his widow. *Id.* Both the widow and ex-wife, the latter on behalf of the insured's children, filed claims for the SGLIA policy proceeds. *Id.* at 49, 102 S.Ct. 49. The ex-wife also filed suit, asking that a constructive trust be placed on any proceeds paid to the widow. *Id.* The Supreme Judicial Court of Maine concluded that the widow should be named as the constructive trustee of the policy benefits and directed that the benefits be paid to the ex-wife on behalf of the insured's children. *Id.* at 50, 102 S.Ct. 49 (citing *Ridgway v. Prudential Ins. Co. of America*, 419 A.2d 1030, 1035 (Me.1980)).

On a writ of certiorari, the Supreme Court first described the history and terms of SGLIA, including its specified order of precedence for paying benefits, 38 U.S.C. § 770(a), and its anti-attachment provision. *Id.* at 52–53, 102 S.Ct. 49. The latter shielded policy payments from creditors' claims and from " 'attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.' " *Id.* (quoting 38 U.S.C. § 770(g)). Noting that "a state divorce decree, like other law governing the economic aspects of

domestic relations, must give way to clearly conflicting federal enactments," the Court then turned to its previous decision in *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950). *Ridgway*, 454 U.S. at 55, 102 S.Ct. 49.

In *Wissner*, the trial court held that benefits paid under the National Service Life Insurance Act (NSLIA), which allowed an insured to designate and change a beneficiary and contained an anti-attachment provision, were community property. *Wissner*, 338 U.S. at 658–59, 70 S.Ct. 398. Although the insured service member named his parents as beneficiaries of his NSLIA policy, the trial court nevertheless directed that proceeds be paid to the insured's widow. *Id.* at 657–58, 70 S.Ct. 398. The Supreme Court in *Wissner* reversed, finding that the trial court's judgment "nullifie[d] the soldier's choice and frustrate[d] the deliberate purpose of Congress." *Id.* at 659, 70 S.Ct. 398.

Quoting that language from *Wissner*, the majority in *Ridgway* then held:

> The present case, we feel, is controlled by *Wissner*. [J]ust as ... in *Wissner*, the insured service member possesses the right *44 freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office. Here, as there, it appropriately may be said: "Congress has spoken with force and clarity in

> directing that the proceeds belong to the named beneficiary and no other."

Ridgway, 454 U.S. at 55–56, 102 S.Ct. 49 (quoting *Wissner*, 338 U.S. at 658, 70 S.Ct. 398). Finding that a state law imposing a constructive trust on SGLIA benefits was preempted by SGLIA, the Court explained: "Federal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary. That right is personal to the member alone. [O]nly [the insured] had the power to create and change a beneficiary interest in his SGLIA insurance." *Id.* at 59–60, 102 S.Ct. 49.

Under a separate heading, the Supreme Court then held that placing a constructive trust on the policy proceeds was also inconsistent with SGLIA's anti-attachment provision. *Id.* at 60–62, 102 S.Ct. 49. Notably, the Court pointed out that it had similarly invoked NSLIA's identical anti-attachment provision as an independent ground for the result reached in *Wissner*. *Id.* at 60, 102 S.Ct. 49.

In light of the virtually identical language used in FEGLIA and SGLIA, we conclude pursuant to *Ridgway* that it is Congress' intent that "only [the insured] [has] the power to create and change a beneficiary interest," that the right to do so cannot be waived or restricted, and that the FEGLI benefits belong to the named beneficiary. *Ridgway*, 454 U.S. at 60, 102 S.Ct. 49; *see Christ*, 979 F.2d at 579 (state's divorce decree and constructive trust conflicted with the rights of the insured specified under FEGLIA). Just as with SGLIA, "Congress has

spoken with force and clarity in directing that the [FEGLI] proceeds *belong to* the named beneficiary **37 and no other."[3] *See* id. at 56, 102 S.Ct. 49 (emphasis added). That is, Congress did not intend merely for the named beneficiary in a FEGLI policy to receive the proceeds, only then to have them subject to recovery by a third party under state law. Simply put, "no persons other than [the beneficiary] have an interest in the policy benefits pursuant to FEGLIA." *45 *Metropolitan Life Ins. Co. v. Armstrong–Lofton*, 19 F.Supp.2d 1134, 1137 (C.D.Cal.1998); *see also O'Neal*, 839 F.2d at 1440 (Congress' intent under FEGLIA was to establish an "inflexible rule" that only the beneficiary would receive the policy proceeds, "regardless of other documents or the equities in a particular case."). Code § 20–111.1(D), by making liable "a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under" Code § 20–111.1(A), "create[s] a beneficiary interest" in the policy proceeds for someone other than the named insured. *Ridgway*, 454 U.S. at 60, 102 S.Ct. 49. In other words, Code § 20–111.1(D) "nullifies the [insured's] choice and frustrates the deliberate purpose of Congress." *Wissner*, 338 U.S. at 659, 70 S.Ct. 398. Thus, Code § 20–111.1(D) "actually conflicts with federal law [by] stand[ing] as an obstacle to the accomplishment and

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[3] In fact, Congress' preemptive intent is more apparent in FEGLIA than in SGLIA, which contains no provision similar to 5 U.S.C. § 8709(d)(1). *See Potter*, 533 So.2d at 594 (holding that given FEGLIA's express preemption provision, it is even more appropriate to conclude that Congress " 'has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other' ") (quoting *Ridgway*, 454 U.S. at 55–56, 102 S.Ct. 49).

execution of the full purposes and objectives of Congress." *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014 (internal quotation marks omitted). Therefore, we hold that Code § 20–111.1(D) is preempted by FEGLIA.

We are aware, as Hillman argues on brief, that our decision today stands in contrast to a majority of state court decisions. Unlike federal courts, state courts have generally held that FEGLIA does not preempt a state-law constructive trust on FEGLI proceeds for the benefit of someone other than the named beneficiary. *See generally McCord v. Spradling*, 830 So.2d 1188, 1202 (Miss.2002) (citing cases and finding persuasive state court holdings that the "distinction between beneficiary status and ultimate equitable entitlement obviates any issue of federal preemption of state-court action"); *Fagan v. Chaisson*, 179 S.W.3d 35, 42 (Tex.Ct.App.2005) (citing cases); *but see, Potter*, 533 So.2d at 593 (holding that FEGLIA preempted state court divorce judgment ordering insured to maintain ex-wife as beneficiary of existing life insurance policies). In doing so, however, these courts have misconstrued *Ridgway*, specifically its reliance on *Wissner*, and the separate, independent discussion of SGLIA's anti-attachment provision. *See Christ*, 979 F.2d at 581 ("SGLIA's anti-attachment provision ... was a separate ground" for finding preemption); *Metropolitan Life Ins. Co. v. McShan*, 577 F.Supp. 165, 169 (N.D.Cal.1983) ("In both *Wissner* and *Ridgway* the existence of an anti-attachment provision was an independent basis upon which the Supreme Court found preemption."). In *Fagan*, for example, the court stated that

"*Ridgway* was decided on two points," the first being that SGLIA's order of precedence for the payment of benefits merely conferred a right on the insured to designate a beneficiary. *46 179 S.W.3d at 44; *see also Kidd*, 821 S.W.2d at 570 (same). That interpretation is incorrect. The Court's first holding in *Ridgway*, made in reliance on its decision in *Wissner*, emphasized that the insured's right to designate a beneficiary and to alter that choice at any time evinced Congress' intent for the policy proceeds to " belong to the named beneficiary and no other."[4] *Ridgway*, 454 U.S. at 56, 102 S.Ct. 49 (internal quotation marks omitted). Hillman, and the courts on which she relies, fail to account for *Ridgway's* reliance on *Wissner*. According to the Supreme Court, *Wissner* controlled the outcome in *Ridgway*, *id.* at 55, 102 S.Ct. 49 and we conclude that *Ridgway*, in turn, controls the result in the case now before us.

**38 State courts distinguishing *Ridgway* also fail to acknowledge what is apparent from a plain reading of the decision, i.e., that its holding based on SGLIA's anti–attachment provision was a separate, independent basis for the result. *See, e.g.*, *McCord*, 830 So.2d at 1197 (distinguishing *Ridgway* solely on the grounds that SGLIA contained an anti-attachment provision). *Ridgway's* discussion of SGLIA's anti-attachment provision began with the statement: the "imposition of a constructive trust is *also* inconsistent with the anti-attachment provision." *Ridgway*, 454 U.S. at 60, 102 S.Ct. 49

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[4] The court in *Fagan* also mistakenly referred to the second holding in *Ridgway* based on SGLIA's anti-attachment provision as the "most important[ ]." *Fagan*, 179 S.W.3d at 44.

(emphasis added). In other words, *Ridgway* is not distinguishable on the basis that FEGLIA does not contain an anti-attachment provision.

In sum, the circuit court erred in concluding that Code § 20–111.1(D) is not preempted by FEGLIA.

CONCLUSION

For these reasons, we will reverse the judgment of the circuit court. Because we conclude that FEGLIA preempts Code § 20–111.1(D), we will enter judgment for Maretta.

Reversed and final judgment.

Justice McCLANAHAN, with whom Justice MILLETTE joins, dissenting.

Justice McCLANAHAN, with whom Justice MILLETTE joins, dissenting.

I.

The constitutional standard governing preemption under the Supremacy Clause, as contained in Article VI of the Constitution of *47 the United States, presents a " 'high threshold' " for the invalidation of a state statute alleged to conflict with federal law. *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. ——, ——, 131 S.Ct. 1968, 1985, 179 L.Ed.2d 1031 (2011) (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (Kennedy, J.,

concurring in part and concurring in judgment)). Accordingly, courts are to address preemption claims "with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). The threshold for invoking preemption is even higher where, as here, the state statute at issue represents a state legislature's exercise of its police power in the area of domestic relations. *Rose v. Rose*, 481 U.S. 619, 625, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979); *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). That is because " 'the whole subject of domestic relations ... belongs to the laws of the States and not to the laws of the United States.' " *Rose*, 481 U.S. at 625, 107 S.Ct. 2029 (quoting *In re Burrus*, 136 U.S. 586, 593–94, 10 S.Ct. 850, 34 L.Ed. 500 (1890)).

Thus, as the United States Supreme Court has stated, " 'when state family law has come into conflict with a federal statute,' " courts should limit their Supremacy Clause review to a determination of " 'whether Congress has "positively required by direct enactment" that state law be pre-empted.' " *Id.* (quoting *Hisquierdo*, 439 U.S. at 581, 99 S.Ct. 802 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 49 L.Ed. 390 (1904))). Indeed, "[b]efore a state law governing domestic relations will be overridden," the Supreme Court has further explained, the state law " '*must do "major damage" to "clear and substantial" federal interests.*' " *Id.* (quoting *Hisquierdo*, 439 U.S. at 581, 99 S.Ct. 802

(quoting *Yazell*, 382 U.S. at 352, 86 S.Ct. 500)) (emphasis added).[1]

In my opinion, this high threshold for imposing preemption in the instant case has not been met. That is, I do not believe Code § 20–111.1(D) (triggered, itself, upon federal preemption of subsection A of the statute) is preempted by the Federal Employees' Group **39 Life Insurance Act (FEGLIA), 5 U.S.C. § 8701 et seq. (2006 & Supp. II 2008).

*48 II.

Subsection A of Code § 20–111.1 provides, in relevant part: "Upon the entry of a decree of annulment or divorce from the bond of matrimony ... any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent...."[2]

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[1] *See* *Brandon v. Travelers Insur. Co.*, 18 F.3d 1321, 1326 (5th Cir.1994) (observing in preemption case that "[f]ederal respect for state domestic relations law has a long and venerable history" and that "[w]hen courts face a potential conflict between state domestic relations law and federal law, the *strong presumption* is that state law should be given precedence" because "family relations [law] has been a sacrosanct enclave" (emphasis added)).

[2] The terms of Code § 20–111.1(A) are expressly inapplicable "(i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contrary result as to specific death benefits, or (ii) to any trust or any death benefit payable to or under any

In revoking the beneficiary designation of a former spouse to a life insurance policy upon divorce, Code § 20–111.1(A) operates as a companion to the revocation-by-divorce statute in Virginia applicable to wills of former spouses, Code § 64.1–59.[3] Addressing the latter statute, this Court has explained that its passage was "a statutory declaration of public policy concerning wills of divorced testators, which provided ... that a divorced spouse is to be denied any benefits under a will executed prior to divorce" based on the testator's presumed change of intent upon divorce. *Papen v. Papen*, 216 Va. 879, 882–83, 224 S.E.2d 153, 155 (1976). "The General Assembly, in evaluating the advisability of [enacting Code § 64.1–59], undoubtedly concluded that the number of forgetful testators who would be benefited by the statute far exceeded the number of careful testators who might be inconvenienced by its enactment." *Id.* at 883, 224 S.E.2d at 155–56. The General Assembly no doubt adhered to a similar conclusion in subsequently enacting Code § 20–111.1(A) with its analogous revocation of a designation of a former spouse as a beneficiary on a life insurance policy upon divorce. *See generally* Alan S. Wilmit, Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 Cornell L.Rev. 653 (1988).

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trust," none of which is presented in this case. Code § 20–111.1(C).

[3] Code § 64.1–59 provides, in relevant part: "If, after making a will, the testator is divorced a vinculo matrimonii or his marriage is annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse...."

As appellant correctly asserts, however, Code § 20–111.1(A), as applicable to the facts in this case, is inconsistent with FEGLIA's directive as to whom life insurance benefits under a FEGLIA policy "shall be paid," as set forth in 5 U.S.C. § 8705(a). Under the *495 U.S.C. § 8705(a) statutory "order of precedence," the first payee of the life insurance is "the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office...."[4] *Id.* Consequently, in this case, pursuant to 5 U.S.C. § 8705(a), the FEGLI policy holder's former spouse, appellant, as the designated beneficiary on the policy, received payment of the insurance proceeds through the federal Office of Personnel Management (the federal agency that administers FEGLIA). Under Code § 20–111.1(A), the policy holder's widow, appellee, would have received the insurance proceeds from her deceased husband's FEGLI policy.

Addressing such conflicts with state law, FEGLIA provides under 5 U.S.C. § 8709(d)(1) that "[t]he provisions of any contract under this chapter [5 USCS §§ 8701 et seq.] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions."

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[4] Several other alternative payees are then listed under 5 U.S.C. § 8705(a) in order of priority in the event there is no designated beneficiary, the first of these being the widow or widower of the deceased policy holder.

The majority thus concludes, and I agree, that Code § 20–111.1(A) is therefore preempted under the express terms of 5 U.S.C. § 8709(d)(1), as Code § 20–111.1(A) **40 would otherwise negate the payment dictated by 5 U.S.C. § 8705(a) where, as here, the designated beneficiary was a former spouse, and the designation was made prior to the divorce of the former spouse and the federal employee policy holder.

III.

The issue on appeal is thus whether Code § 20–111.1(D), which is triggered upon the federal preemption of subsection A of the statute, is itself preempted under FEGLIA.

The General Assembly amended Code § 20–111.1 in 2007 by adding subsection D to the statute, which provides as follows: "If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment *50 to the person who would have been entitled to it were this section not preempted." *See* 2007 Acts ch. 306.

Passage of this amendment no doubt reflects the General Assembly's recognition that subsection A of Code § 20–111.1 was preempted by FEGLIA pursuant to 5 U.S.C. § 8709(d)(1). The General Assembly dealt with this impediment to implementation of its public policy embodied in

subsection A's revocation-by-divorce provision for life insurance policies by establishing, in subsection D of Code § 20–111.1, an equitable remedy in favor of a third party who otherwise would have been entitled to receive the insurance proceeds pursuant to subsection A—in this case, the decedent's widow. Under the new provision, the former spouse, as the designated beneficiary, is made personally liable to the third party for an amount equal to the insurance proceeds paid to the former spouse upon the death of the federal employee policy holder.

Thus, as the majority acknowledges, unlike subsection A, subsection D "does not alter the direct payment of FEGLI benefits to a designated beneficiary" in establishing the equitable remedy against the former spouse. After assessing this key factor against the limited federal interest implicated under 5 U.S.C. § 8705(a)'s payment provision for FEGLI benefits, I believe that Code § 20–111.1(D) does no "major damage" to that federal interest. *Rose*, 481 U.S. at 625, 107 S.Ct. 2029 (citations and internal quotation marks omitted).

Viewed through the prism of our governing standard of review, FEGLIA simply does not evince congressional intent to shield a former spouse from liability against a third party claim involving FEGLI proceeds that have already been paid to the former spouse. Rather, as the majority also acknowledges, 5 U.S.C. § 8705(a)'s "order of precedence" for the payment of FEGLI benefits was enacted for the purpose of providing "administrative convenience" for the federal Office of Personnel Management (OPM) and the insurer in processing claims and

distributing benefits. *See* *Kidd v. Pritzel*, 821 S.W.2d 566, 568–70 (Mo.Ct.App.1991) (detailing the legislative history of 5 U.S.C. § 8705 and cited by the majority). Addressing this point, the Missouri Court of Appeals in *Kidd* aptly explains that

> [section] 8705 serves a valuable and worthwhile purpose by keeping the OPM and the insurance company out of legal entanglements. It fulfills the congressional intention by reducing*51 their administrative and legal hassles. *Regardless of what claims are brought to recover the proceeds once they are paid out to the designated beneficiary, the purpose of § 8705 has been served.* Neither the insurance carrier nor the government can be burdened by participation in a state judicial proceeding to recover the proceeds.

Id. at 572 (emphasis added). And this administrative convenience—the ability of the OPM and the insurer to simply pay the life insurance proceeds to the named beneficiary as directed by 5 U.S.C. § 8705, close the file, and move on to the next claim, as they did in this case—remains completely intact with the application of Code § 20–111.1(D). Accordingly, FEGLIA should not be held to preempt Code § 20–111.1(D).

I thus agree with the majority of state courts in other jurisdictions that have addressed the issue of preemption under FEGLIA and have similarly concluded that their **41 state domestic relations

laws, in creating an equitable claim for an amount equal to the FEGLI insurance proceeds that have been paid to the named beneficiary, are not preempted by FEGLIA. *See, e.g.*, *Fagan v. Chaisson*, 179 S.W.3d 35, 42 (Tex.App.2005); *McCord v. Spradling*, 830 So.2d 1188, 1203 (Miss.2002); *Sedarous v. Sedarous*, 285 N.J.Super. 316, 666 A.2d 1362, 1363 (Ct.App.Div.1995); *Eonda v. Affinito*, 427 Pa.Super. 317, 629 A.2d 119, 123 (1993); *Kidd*, 821 S.W.2d at 575; *In re Estate of Anderson*, 195 Ill.App.3d 644, 142 Ill.Dec. 79, 552 N.E.2d 429, 434–35 (1990); *Roberts v. Roberts*, 560 S.W.2d 438, 439–40 (Tex.App.1977).

Unlike my colleagues, my view of congressional intent reflected in FEGLIA is not altered by *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), or *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950) (the case that the United States Supreme Court relied upon in deciding *Ridgway*), where the Court imposed post-payment protection for the life insurance proceeds paid to the respective armed services member's designated beneficiary in each of those cases. I believe *Ridgway*, a Servicemen's Group Life Insurance Act (SGLIA) case, and *Wissner*, a National Service Life Insurance Act (NSLIA) case, are distinguishable from the instant FEGLIA case.

NSLIA, as the predecessor to SGLIA, placed into effect a system of life insurance benefits specifically designed for our armed services members shortly before the beginning of World War II. It then lapsed at the end of the Korean War, when private commercial insurance *52 generally became

available for service members. *Ridgway*, 454 U.S. at 50–51, 102 S.Ct. 49. SGLIA was subsequently enacted in response to private carriers' restrictions on coverage for service members as a result of the escalating Vietnam conflict. *Id.* at 50, 102 S.Ct. 49. Like federal employees under FEGLIA, armed services members possessed the right under both NSLIA and SGLIA to designate the beneficiaries of their choice. *Id.* at 55–56, 102 S.Ct. 49. Both NSLIA and SGLIA, however, contained an identical anti-attachment provision that was not included in FEGLIA. *Id.* at 60, 102 S.Ct. 49. Under the anti-attachment provision, "[p]ayments to the named beneficiary 'shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, *either before or after receipt by the beneficiary* ....' " *Wissner*, 338 U.S. at 659, 70 S.Ct. 398 (quoting 38 U.S.C. § 816) (emphasis added).

Assessing the beneficiary designation and anti-attachment provisions together, the Supreme Court in *Ridgway* explained: "'Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The *exemption provision is his guarantee* of the complete and full performance of the contract *to the exclusion of conflicting claims.* The end is a legitimate one within the *congressional powers over national defense,* and the means are adapted to the chosen end.'" *Ridgway*, 454 U.S. at 56–57, 102 S.Ct. 49 (quoting *Wissner*, 338 U.S. at 660–61, 70 S.Ct. 398 (emphasis added)). The Supreme Court then concluded its analysis by explaining that, with the anti-attachment clause,

"Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence. That is Congress' choice. It remains effective until legislation providing otherwise is enacted." *Id.* at 63, 102 S.Ct. 49.

FEGLIA, by contrast, simply made group life insurance available to federal employees so as to " 'appl[y] to Government service the best practices of progressive, private employers.'" *Fagan*, 179 S.W.3d at 45 (quoting *Kidd*, 821 S.W.2d at 568; some internal quotation marks omitted). Manifestly, its passage was "not attended by the exigenc[ies] that motivated" Congress when passing NSLIA and SGLIA in the context of national defense. *Id.* The omission of an anti-attachment clause in FEGLIA should thus be viewed as answering in the negative the question of whether Congress intended to preempt a state law like Code § 20–111.1(D)—one that impacts FEGLI *53 benefits, if at all, only after the benefits have been paid to the designated beneficiary. With a **42 comprehensive statutory scheme like FEGLIA, such an "omission [ ]" is a "significant one[ ]." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (addressing absence of anti-alienation provisions under ERISA as to welfare benefit plans). As the Texas Court of Appeals stated in an analogous FEGLIA case, " '[i]f Congress had desired to totally pre-empt all state law claims[,] it would have included an anti-attachment provision [in] FEGLIA. *Ridgway* expressly stated that if Congress chose to avoid the result in that case, it

could do so by enacting legislation which did not include an anti-attachment provision. That is precisely what Congress did when it enacted FEGLIA.'" *Fagan*, 179 S.W.3d at 45 (quoting *Kidd*, 821 S.W.2d at 571); *see Sedarous*, 666 A.2d at 1367 ("[I]f Congress had intended the same immunity of proceeds from state court action in FEGLIA as it provided for in SGLIA, it could easily have done so by the simple expedient of including SGLIA's anti-attachment provision in FEGLIA.").

I also find support for my position in both federal and state court decisions addressing preemption under the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., a statutory scheme more analogous to FEGLIA than either NSLIA or SGLIA.

Like FEGLIA's "order of precedence" under 5 U.S.C. § 8705(a) dictating payment of the insurance proceeds to the designated beneficiary, ERISA requires payment of life insurance benefits provided under an ERISA employee welfare benefit plan to the designated beneficiary. *Central States Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 677 (6th Cir.2000); *see Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009) (holding that the plan administrator must distribute benefits according to the plan documents pursuant to 29 U.S.C. § 1104(a)(1)(D), in order to satisfy ERISA's goal of establishing efficiency in benefit administration). Also like FEGLIA, ERISA expressly preempts "all State laws" that "relate to" an ERISA plan. 29 U.S.C. § 1144(a). And, like FEGLIA, ERISA

contains no anti-attachment or anti-alienation provision as to welfare benefit plans, which are the plans under ERISA that govern life insurance benefits. *See* *Mackey*, 486 U.S. at 836–37, 108 S.Ct. 2182. Furthermore, while ERISA does contain an anti-alienation provision for pension plans under 29 U.S.C. § 1056(d)(1), this provision simply requires each pension plan to "provide that benefits provided*54 under the plan may not be assigned or alienated." As such, section 1056(d)(1) is much more limited in scope than the anti-attachment provision contained in both NSLIA and SGLIA (which, again, is absent from FEGLIA).

Addressing this statutory framework under ERISA, the Sixth Circuit held in *Central States* that ERISA did not preempt the imposition of a constructive trust, under state law, on the life insurance benefits provided under an ERISA employee welfare benefit plan once those benefits had been distributed to the designated beneficiary according to the plan documents. *Central States*, 227 F.3d at 678–79. More specifically, as the Sixth Circuit explained:

> In this case, [appellee] seeks to impose a constructive trust on [her former husband's] ERISA welfare benefit plan benefits. [He] changed the beneficiary designation in accordance with the plan documents [thereby removing appellee as the beneficiary]. On this issue, our precedents are clear—the beneficiary card controls the person to whom the plan administrator

> must pay the benefits. However, we hold today that once the benefits have been released to the properly designated beneficiary, the district court has the discretion to impose a constructive trust upon those benefits in accordance with applicable state law if equity so requires.

Id. at 679.

The Supreme Court of Michigan reached the same conclusion in *Sweebe v. Sweebe*, 474 Mich. 151, 712 N.W.2d 708 (2006). There, the appellant/former wife and the decedent/former husband entered into an agreement at the time of their divorce giving up any interest in any insurance policy of the other. The decedent had a life insurance **43 policy governed by ERISA on which he had designated appellant as the beneficiary several years before their divorce, and never changed the designation after the divorce. *Id.* at 710. Appellee, decedent's subsequent wife/widow, acting on behalf of the decedent's estate, instituted an action under state law seeking to enforce the former wife's waiver to any claim to the proceeds from the decedent's life insurance policy. *Id.* The Michigan Supreme Court held that ERISA did not preempt the estate's state law claim to the insurance proceeds, and affirmed the lower court's order directing the former wife "to pay an amount equal to the insurance proceeds to the decedent's *55 estate." *Id.* In reaching its decision, the Court recognized that, "under ERISA preemption, Michigan law cannot affect ERISA's determination of the proper beneficiary," and "ERISA provides that

a plan administrator must distribute the proceeds of the insurance policy to the named beneficiary." *Id.* at 711 (citations omitted). The Court concluded, however, that after the benefits are properly distributed under ERISA, as they were there, the issue of whether the former wife could "lawfully retain them" was an issue "governed exclusively by Michigan law." *Id.*

In *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir.1994), the Tenth Circuit reached a similar conclusion even as to ERISA pension benefits. There, the Court held that, while the anti-alienation provision of ERISA precluded a state claim for garnishment against pension benefits before their distribution to a plan participant or beneficiary, nothing in the legislative scheme protected the benefits following their distribution to such participant or beneficiary. *Id.* at 1082–83. That is, a creditor could "collect directly from the participant or beneficiary or, as [there], initiate an enforce[ment] procedure against a third-party bank [that held] the funds paid to the participant or beneficiary." *Id.*; *see* *Pardee v. Pardee*, 112 P.3d 308, 315–16 (Okla.Civ.App.2005) (holding that ERISA did not preempt allocation of a percentage of the pension plan funds to appellee pursuant to state law following distribution of the funds, as the funds "were no longer entitled to ERISA protection once [they] were distributed"); *Hoult v. Hoult*, 373 F.3d 47, 54–55 (1st Cir.2004) (holding that the anti-alienation provision under ERISA applies to pension funds "only while held by the plan administrator and not after they reach the hands of the beneficiary"); *Wright v. Riveland*, 219

F.3d 905, 919–21 (9th Cir.2000) (same); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54–56 (3rd Cir.1994) (same); *see also DaimlerChrysler Corp. v. Cox*, 447 F.3d 967, 974 (6th Cir.2006) (recognizing principle).

IV.

For the above-stated reasons, I would affirm the judgment of the circuit court in this case. In my opinion, the circuit court, in a thorough and well-reasoned opinion, correctly concluded that Code § 20–111.1(D) is not preempted by FEGLIA. Therefore, I dissent from the majority's decision reversing the circuit court's judgment.

Va.,2012.
Maretta v. Hillman
283 Va. 34, 722 S.E.2d 32

[Entered: July 30, 2010]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JACQUELINE HILLMAN

Plaintiff,

v. **CL 2009-15137**

JUDY A. MARETTA

Defendant.

ORDER

THIS CAUSE came to be heard upon Plaintiff's Motion for Summary Judgment and Memorandum of Points and Authorities previously filed herein;

IT APPEARING TO THE COURT that there are no material facts in dispute between the parties; and

IT FURTHER APPEARING TO THE COURT that Defendant, in opposition to Plaintiff's Motion for Summary Judgment, incorporated by reference the legal arguments and authorities set forth and presented to the Court in Defendant's Plea in Bar and Demurrer; and

IT FURTHER APPEARING TO THE COURT that this Court in an Opinion Letter written by the Honorable Michael F. Devine dated June 23, 2010 ruled on the issues raised by Defendant in her Plea in Bar and Demurrer, and upon review of said Opinion Letter, the pleadings filed and read herein, the appropriate statutes, and arguments of counsel, that this Order is a proper one, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is granted; and it is further

ORDERED that the Opinion Letter from the Honorable Michael F. Devine dated June 23, 2010 is hereby adopted by reference into this Order as though it were fully restated herein; and it is further

ORDERED that judgment is GRANTED to Plaintiff, JACQUELINE HILLMAN, in the amount of One Hundred Twenty Four Thousand Five Hundred Fifty Eight Dollars and Three Cents ($124,558.03) plus interest at the Judgment Rate from the date of the entry of this Order.

AND THIS CAUSE IS FINAL.

ENTERED this 30th day of July 2010.

/s/
JUDGE, Fairfax County Circuit Court

SEEN AND AGREED

SMOLENPLEVY

/s/ Daniel H. Ruttenberg
Daniel H. Ruttenberg, Esquire
Counsel for Plaintiff
VSB # 41863
8045 Leesburg Pike, Suite 540
Vienna, Virginia 22182
703-790-1900
703-790-1754 (facsimile)

SEEN AND OBJECTED TO FOR THE REASONS SET FORTH IN THE OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, THE HEARING ON THE MOTION FOR SUMMARY JUDGMENT, THE DEMURER AND PLEA IN BAR, PLEADINGS IN SUPPORT OF THE DEMURRER AND PLEA IN BAR AND AT THE HEARING ON MAY 7, 2010.

PETERSON SAYLOR, PLC

/s/ George O. Peterson
George O. Peterson (VSB No. 44435)
Tania M. L. Saylor (VSB No. 65904)
4163 Chain Bridge Road
Fairfax, VA 22030
Phone: (703) 225-3620
Facsimile: (703) 225-3621
Counsel for Defendant Judy Maretta

[Entered: June 25, 2010]

Not Reported in S.E.2d, 80 Va. Cir. 439,
2010 WL 7373701 (Va.Cir.Ct.)

(Cite as: 2010 WL 7373701 (Va.Cir.Ct.))

Circuit Court of Virginia.

Jacqueline **HILLMAN**
v.
Judy A. **MARETTA**.

No. CL 2009–15137.
June 25, 2010.

Daniel H. Ruttenberg, Esq., Smolen Plevy, P.C., Vienna, VA, for Plaintiff Jacqueline Hillman.

George O. Peterson, Esq., Peterson Saylor, P.L.C., Fairfax, VA, for Defendant Judy A. Maretta.

MICHAEL F. DEVINE, J.

*1 Dear Counsel:

Plaintiff Jacqueline Hillman ("Ms.Hillman") and Defendant Judy A. Maretta ("Ms.Maretta") came before the Court on May 7, 2010, on Ms. Maretta's Plea in Bar/Demurrer. The federal preemption issue presented by Ms. Maretta's motion is a matter of first impression in Virginia. After conducting the hearing on the motion, the Court took the matter under advisement.

In her motion, Ms. Maretta argues that the statutory "order of precedence" set forth in the Federal Employees' Group Life Insurance Act ("FEGLIA") preempts the constructive trust remedy provided by Virginia Code § 20–111.1(D), under which Ms. Hillman brought the instant cause of action. Under the FEGLIA order of precedence, policy proceeds are to be paid first to the designated beneficiary of the policy, and then to the widow if there is no designated beneficiary. The parties agree that Ms. Maretta is the proper beneficiary under FEGLIA, and that FEGLIA preempts Code § 20–111.1(A), which would have revoked the beneficiary designation of Ms. Maretta upon the entry of the divorce decree between Mr. Hillman and Ms. Maretta. The issue, then, is whether FEGLIA also preempts subsection (D) of that statute, which imposes a constructive trust on death benefit proceeds when subsection (A) is preempted, making a former spouse personally liable for the amount of the payment "to the person who would have been entitled to it" were subsection (A) not preempted. After full consideration of the pleadings, the *ore terms* arguments, and the applicable governing authorities, the Court now holds that Virginia Code § 20–111.1(D) is not preempted by FEGLIA for the reasons set forth herein.

BACKGROUND[1]

On December 2, 1996, William Hillman ("Mr.Hillman") designated Ms. Maretta, his wife at the time, as the beneficiary of his Federal Employees' Group Life Insurance ("FEGLI") policy. Although Mr. Hillman and Ms. Maretta divorced on December 29, 1998, and Mr. Hillman married Ms. Hillman on October 11, 2002, Mr. Hillman did not change the beneficiary designation of his FEGLI policy. Mr. Hillman died unexpectedly on July 28, 2008, while still married to Ms. Hillman.

In October 2008, after Ms. Hillman unsuccessfully filed a claim under Mr. Hillman's FEGLI policy, Ms. Maretta filed a claim for the death benefit and received proceeds in the amount of approximately $124,558.03. On October 22, 2009, Ms. Hillman filed the instant Complaint, alleging that she was entitled to the FEGLI proceeds pursuant to Virginia Code § 20–111.1(D), which would impose a constructive trust on the FEGLI proceeds by making Ms. Maretta personally liable to Ms. Hillman for the full amount of the benefit.

ANALYSIS

I. STANDARD OF REVIEW

A demurrer tests the legal sufficiency of a pleading and should be sustained if the pleading,

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[1] The facts herein, which are laid out for the purpose of the instant motion only, are based on the undisputed facts contained in the parties' memoranda in support of or in opposition to Ms. Maretta's motion.

considered in the light most favorable to the plaintiff, fails to state a valid cause of action. VA.CODE ANN. § 8.01-273; *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 914 (2001). Similarly, a plea in bar is a defensive tool which shortens litigation by reducing it to a distinct issue of fact which, if proven, results in a bar to the Plaintiff's recovery. *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996). In this case, there are no issues of material fact for the Court to determine—the sole issue, which may be brought before the Court on either a demurrer or plea in bar, is whether the Virginia statute upon which Ms. Hillman's claim rests is preempted.

II. THE APPLICABLE LANGUAGE OF FEGLIA AND VIRGINIA CODE § 20-111.1

*2 FEGLIA § 8705, known as the statutory order of precedence, provides:

> Except as provided in subsection (c), the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death *shall be paid,* on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed

> writing received before death in the employing office ...
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee ...

5 U.S.C. § 8705 (emphasis added). In enacting FEGLIA, Congress expressly provided for the preemption of state laws regulating the extent of coverage or benefits that are inconsistent with FEGLIA in a preemption provision as follows:

> The provisions of any contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including *payments with respect to benefits) shall supersede and preempt any law* of any State or political subdivision thereof, or any regulation issued thereunder, *which relates to group life insurance* ***to the extent that the law or regulation is inconsistent with the contractual provisions.***

5 U.S.C. § 8709(d)(1) (emphasis added).

As previously stated, the parties agree that FEGLIA preempts Virginia Code § 20–111.1(A), which provides:

> Upon the entry of a [divorce] decree ... any revocable beneficiary designation contained in a then existing written contract owned by one party

> that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent.

Va.Code § 20–111.1(A).[2] The issue, then, is whether FEGLIA also preempts Subsection (D) of that statute, which provides:

> If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section *is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.*
>
> VA.CODE § 20–111.1(D) (emphasis added).

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[2] The parties agree that this subsection is preempted because, by revoking the beneficiary designation, the statute directly conflicts with FEGLIA's requirements that plans be administered, and benefits be paid, in accordance with FEGLI plan documents. Further, subsection (A) is may provide for the distribution of proceeds to someone other than the designated beneficiary, and the FEGLIA order of precedence expressly provides that proceeds "shall be paid" to the designated beneficiary if there is one.

III. FEDERAL PREEMPTION OF STATE LAW

The Supremacy Clause of the United States Constitution makes "the Laws of the United States ... the supreme law of the Land ... anything in the Constitution or Law of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under the doctrine of federal preemption of conflicting state law, which is derived from the Supremacy Clause, federal preemption may be express or implied, and occurs in three situations. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). First, Congress may expressly define the extent to which a federal statute preempts state law ("express preemption"). *E.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Second, preemption is implied when a pervasive scheme of federal regulation makes it reasonable to infer that Congress intended exclusive federal regulation of the field ("field preemption"). *English v.. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Third, preemption is also implied where state law actually conflicts with federal law, such that either (a) compliance with both state and federal law is impossible; or (b) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ("conflict preemption"). *Gade*, 505 U.S. at 98. The "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." *Id.*

***3** With respect to domestic relations law, the Supreme Court of the United States has said that

"state interests ... in the field of family and family-property arrangements ... should be overridden ... only where clear and substantial interests of the National Government ... will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352 (1966). "The pertinent questions are [1] whether the right as asserted conflicts with the express terms of federal law and [2] whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979). Thus, while this Court's "ultimate task ... is to determine whether [Virginia Code § 20–111.1(D)] is consistent with the structure and purpose of [FEGLIA] as a whole," *Gade*, 505 U.S. at 98, this Court will only find that FEGLIA preempts this domestic relations law if (1) Ms. Hillman's rights as asserted "conflicts with the express terms" of FEGLIA or (2) the Virginia statute's "consequences sufficiently injure" FEGLI objectives to require preemption. *Hisquierdo*, 439 U.S. at 583. Keeping these preemption maxims in mind, this Opinion Letter first discusses *Ridgway v. Ridgway*, 454 U.S. 46 (1981), and *Dugan v. Childers*, 261 Va. 3, 539 S.E.2d 723 (2001), as Ms. Maretta argues that the rationale underlying those cases governs the preemption issue in this case. This Opinion Letter then examines persuasive authority on the FEGLIA preemption issue, and applies each of the three federal preemption tests to Code § 20–111.1(D).

A. *Ridgway v. Ridgway*

In *Ridgway*, a United States Army Sergeant had designated that his life insurance proceeds be

paid as specified by law, despite a state court divorce decree obligating him to maintain life insurance for the benefit of his children. *Ridgway*, 454 U.S. at 48–49. The Supreme Court of the United States held that the federal law at issue, the Servicemembers' Group Life Insurance Act ("SGLIA"), preempted the state court decree obligation, and thus applied the federal statutory prescription for distribution of the proceeds. *Id.* at 63. The Court concluded that Congress, in enacting SGLIA, "spoke[ ] with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.* at 56, 59–60 ("[f]ederal law and federal regulations bestow upon the service member an *absolute right to designate* the policy beneficiary. That right is personal to the member alone.") (emphasis added).

In a separate section of its decision, the Court also held that the "imposition of a constructive trust upon the insurance proceeds is also inconsistent with the anti-attachment provision" in SGLIA. *Id.* at 57. That provision shields SGLIA payments "from taxation" and from "claims of creditors," and states that the payments "shall not be liable to attachment, levy, or seizure by or under *any legal or equitable process whatever*, either before *or after* receipt by the beneficiary." 38 U.S.C. § 770(g) (emphasis added). The Court emphasized "the unqualified sweep" of § 770(g), which prohibits, "in the broadest of terms," *any* attachment by *any* legal *or* equitable process *whatever*. *Ridgway*, 454 U.S. at 60–61 (rejecting the lower court's attempt to limit the reach of § 770(g) on the theory that the purpose of the anti-attachment provision was to protect the policy proceeds from the claims of creditors, and not from minor children

asserting equitable interests). In addition, the Court noted that the anti-attachment provision "prevents the vagaries of state law from disrupting ... congressional policy." *Id.* at 61. Earlier in the decision, the Court explained Congress' intent in enacting SGLIA as follows:

> *4 Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.

Id. at 56–57 (quoting *Wissner v. Wissner*, 338 U.S. 655, 660–61 (1950)).

In sum, the Court's decision in *Ridgway* consists of two holdings: (1) the state divorce decree, by requiring the servicemember to maintain his children as the designees of his SGLIA policy, conflicts with the express terms of SGLIA and injures federal objectives by interfering with the servicemember's "absolute right to designate the policy beneficiary"; and (2) the imposition of a constructive trust conflicts with the express and broad terms of § 770(g), which shields SGLIA policy proceeds from all state equitable remedies. Thus, the Court did *not*, as Ms. Maretta contends, hold that imposition of a constructive trust conflicted with the

terms of SGLIA governing beneficiary designations—rather, the equitable remedy conflicted with the broad anti-attachment provision in SGLIA.

Unlike the *Ridgway* divorce decree, which *required* that the decedent maintain his children as his SGLIA beneficiaries, Virginia Code § 20–111.1 did not require that Mr. Hillman designate or maintain any particular individual(s) as his FEGLI beneficiary. Therefore, *Ridgway's* first holding is distinguishable on its facts. Moreover, as FEGLIA does not contain any anti-attachment provision, *Ridgway's* second holding is also distinguishable on its facts. Given these two differences, as well as the disparities of congressional intent in enacting SGLIA versus FEGLIA,[3] the Court finds that the Supreme Court's rationale in *Ridgway* does not govern the present FEGLIA preemption issue.

B. *Dugan v. Childers*

In *Dugan,* the Supreme Court of Virginia found that the federal law governing a military retiree's Survivor Benefit Plan ("SBP law") preempted a conflicting Virginia divorce decree that required the husband to assign his ex-wife half of his retirement benefits. *Dugan*, 261 Va. at 8, 539 S.E.2d at 725. The SBP law provides express procedures through which a former spouse may receive SBP annuity benefits—namely, the retiree is deemed to make the election to provide the annuity if the secretary of the appropriate branch of the military

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[3] This memorandum discusses congressional intent in enacting FEGLIA under Section D of the Analysis.

service receives from the former spouse a written request, together with a copy of the court order, that such an election be deemed to have been made. 10 U.S.C. §§ 1450(f)(3)(A)(i)-(ii). Further, such request must be received by "the Secretary concerned" within one year of the date of the court order. *Id.* § 1450(f)(3)(C).

In finding preemption, the Court emphasized three points. First:

> In providing the means by which former spouses may become entitled to SBP annuity benefits, Congress enacted plain and precise statutory language placing conditions and limits on that right and made clear that any annuity benefits paid in compliance with the provisions of the SBP are not subject to legal process....

*5 When a special limitation is part of the statute creating the substantive right, the limitation is not merely a procedural requirement, but a part of the newly created substantive cause of action. The special limitation is a condition precedent to maintaining the claim and failure to comply with it bars the claim.

Dugan at 8–9, 539 S.E.2d at 725–26 (quotations omitted). In other words, the SBP law created the sole procedural and substantive means through which a former spouse may be entitled to a military retiree's SBP annuity payments. The

plaintiff's failure to comply with such procedures thus barred her equitable claim.

Second, the SBP law contains an anti-alienation provision that provides that "an annuity under [the SBP law] is not assignable or subject to execution, levy, attachment, garnishment, *or other legal process*" 10 U.S.C. § 1450(i) (emphasis added). In finding that this non-alienation provision "would be sufficient alone to require a finding of preemption," the Court held that "the term 'other legal process'... encompasses the imposition of a constructive trust upon annuity benefits. *Dugan* at 10, 539 S.E.2d at 726. Therefore, as in *Ridgway*, there was an anti-alienation provision that explicitly prevented the former spouse from using any legal process in an attempt to reach the military retiree's SBP benefits.

Third, the Court found that:

> '[T]he consequences of enforcing the conflicting state law principles sufficiently injures the objectives of the SBP so that federal law preempts the authority of state law'... [t]o award [the former spouse] the survivor's benefits she seeks would seriously conflict with and effectively cancel both the 'plain and precise' one-year limitation Congress placed on a former spouse's right to claim the benefits and the clear prohibition against subjecting an annuity to legal process.

Id. (quoting King v. King, 483 S.E.2d 379, 383 (Ga.Ct.App.1997)). The Court thus found that the Virginia divorce decree, which would effectively negate this federal one-year limitation, was appropriately overridden by the SBP law because clear and substantial federal interests would "suffer major damage if the state law [were] applied." *Id.* at 8, 539 S.E.2d at 725 (quoting *Yazell*, 382 U.S. at 352).

The facts and federal law at issue in the instant case are easily distinguishable on all three of these points. First, FEGLIA does not create a substantive cause of action through which Ms. Hillman could collect Mr. Hillman's FEGLI proceeds. Second, as noted above, FEGLIA does not contain any anti-alienation or similar provision that precludes the imposition of a constructive trust upon FEGLI proceeds. Third, if Ms. Hillman were to be able to reach the FEGLI proceeds, her actions would not be in direct contravention of any "plain and precise" requirement or "clear prohibition" expressly provided for in FEGLIA. The Court thus finds that the Supreme Court of Virginia's rationale in *Dugan* does not govern this case either.

C. FEGLIA Preemption of Foreign State Equitable Remedies

***6** While there is no binding authority with respect to FEGLIA preemption of Virginia law, there are a number of foreign state and federal courts that have encountered the FEGLIA preemption issue. Ms. Maretta cites a number of federal decisions that she claims stand for the proposition that FEGLIA

preempts state laws providing for constructive trusts and other equitable remedies. In each of these federal cases, however, the plaintiffs asserted their entitlement to the decedent's FEGLI proceeds through a divorce decree or separation agreement that *required* the insured to maintain his or her FEGLI policy for their benefit. These courts, employing the *Ridgway* rationale, held that the divorce decrees at issue directly conflicted with the FEGLIA provision granting an insured the absolute right to designate any beneficiary that he or she chooses. *Metro. Life Ins. Co. v. Zaldivar et al.*, 413 F.3d 119, 120 (1st Cir.2005) (holding that FEGLIA preempted a state divorce decree which ordered the insured to maintain his FEGLI policy for the benefit of his children from his first marriage); *Metro. Life Ins. Co. v. Christ, et al.*, 979 F.2d 575, 579–80 (7th Cir.1992) (holding that FEGLIA preempted a divorce decree that ordered the insured to designate his children as beneficiaries on his FEGLI policy); *Metro. Life Ins. Co. v. Armstrong–Lofton, et al.*, 19 F.Supp.2d 1134, 1137 (C.D.Cal.1998) (holding that, to the extent that California community property law gave the insured's former spouses or his daughter an interest in his FEGLI benefits, it conflicted with FEGLIA's order of precedence); *Metro. Life Ins. Co. v. Pearson*, 6 F.Supp.2d 469, 471 (D.Md.1998) (holding that the asserted right of the insured's child, based on his agreement with his mother during their divorce to name the child as his FEGLI beneficiary, was preempted by FEGLIA); *Metro. Life Ins. Co. v. Bell*, 924 F.Supp. 63, 65 (E.D.Tex.1995) (finding FEGLIA preemption of a state divorce decree that designated the decedent's

FEGLI policy as community property and then awarded the former spouse one-half of the proceeds).

Some of these federal decisions further held that the plaintiff's constructive trust claims injured the express objectives of another FEGLIA provision that allowed a divorce decree to govern a FEGLI beneficiary designation *if* the insured or the beneficiary provides a copy of the divorce decree to the employing agency *before* the insured's death. 5 U.S.C. § 8705(e) (providing that FEGLI proceeds "shall be paid ... to another person ... if and to the extent expressly provided for in the terms of any court decree of divorce ... [if] it is received, before the date of the covered employee's death, by the employing agency"). Similar to the provision regarding annuities for SBP benefits in *Dugan*, courts have held that this FEGLIA provision directly conflicts with state laws providing that beneficiary designations in state divorce decrees may be enforced through a constructive trust in lieu of the procedures expressly set forth in FEGLIA. *Zaldivar*, 413 F.3d at 120 (finding conflict preemption under this FEGLIA provision, as the divorce decree was not sent to the employing agency before the insured's death). The proposition, based on the foregoing federal authorities, that FEGLIA preempts *all* state laws that impose constructive trusts and other equitable remedies is therefore inaccurate given that these federal cases all involved divorce decrees that *mandated* that the insured designate a particular beneficiary. Furthermore, any state equitable remedy designed to enforce the divorce decrees in those cases was in direct contravention of the express FEGLIA procedures through which FEGLI

proceeds may be paid out in accordance with a divorce decree.

*7 In contrast to the federal cases, the vast majority of foreign state courts have upheld state laws establishing equitable remedies in FEGLI cases. However, none of these cases involve a state statute similar to Virginia Code § 20–111.1(D), and many of them, like the federal cases, involve divorce decrees or separation agreements under which an insured is obligated to provide insurance benefits to his former spouse and/or children. Consequently, there appears to be an incongruity between federal and state analyses of FEGLIA preemption issues. *McCord v. Spradling*, 830 So.2d 1188, 1193, 1203 (Miss.2002) ("while the federal courts have held that FEGLIA preempts state equitable actions, such is not the case with a large majority of state courts that have addressed this issue," including Texas, North Carolina, Illinois, Missouri, Pennsylvania, and New Jersey). Nevertheless, the Court finds the reasoning behind some of the state cases instructive.

In *Sedarous v. Sedarous*, for example, the New Jersey superior court held that FEGLIA does not preempt the state court from imposing a constructive trust on the insurance proceeds after the death of the insured. ***666*** A.2d 1362, 1363 (N.J.Super.Ct.App.Div .1995). Mr. Sedarous had designated his sister as the sole beneficiary of his life insurance policies. *Id.* He later commenced divorce proceedings against his wife, but before final judgment was entered, he died, and Mrs. Sedarous sought to impose a constructive trust on the FEGLI proceeds. *Id.* at 1363–64. The starting point for the

court's analysis was *Ridgway*, which the court found distinguishable because (1) "FEGLIA is not attended by the exigency that motivated SGLIA, namely the congressional intention to provide military personnel on active duty with insurance unavailable to them in the private market because of the hazardous nature of their work[; and (2)] FEGLIA, unlike SGLIA, does not have any anti-attachment provision." *Id.* at 1365. The court then concluded:

> Considering ... the administrative convenience that is at the heart of [FEGLIA, and] the intensity and pervasiveness of the state interest in the financial protection of the dependents of the divorced obligor spouse, we are confident that FEGLIA's lack of an anti-attachment provision is the critical factor justifying, if not indeed compelling, the conclusion that *Ridgway* does not govern the FEGLIA preemption issue. Clearly, if Congress had intended the same immunity of proceeds from state court action in FEGLIA as it provided for in SGLIA, it could easily have done so by the simple expedient of including SGLIA's anti-attachment provision in FEGLIA. The fact that it did not militates strongly against both a preemption conclusion and a mandatory extension of *Ridgway* to FEGLIA problems.

Id. at 1367. The New Jersey court then held that, in light of paramount state interest in domestic

relations, FEGLIA does not preclude the state court from imposing a constructive trust on insurance proceeds in the same manner as if the insurance had been privately contracted for. *Id.* at 1366–67.

*8 Finding *Sedarous* and similar state decisions persuasive, the Supreme Court of Mississippi also held that "the existence of a named beneficiary to whom the insurer is directed to pay any benefits does not eliminate any equitable claims to the funds paid." *McCord*, 830 So.2d at 1203. The court emphasized the portions of other state decisions that laid out Congress's intent in enacting FEGLIA—namely, to alleviate administrative difficulties when paying out death benefits and to avoid serious delay in paying the benefits to survivors. *Id.* at 1196 (quoting *Kidd v. Pritzel*, 821 S.W.2d 566, 573 (Mo.Ct.App.1991); *In re Estate of Anderson*, 552 N.E.2d 429, 435 (Ill.App.Ct.1990)). The court also found persuasive the other courts' holdings that the "distinction between beneficiary status and ultimate equitable entitlement obviates any issue of federal preemption of state-court action." *Id.* at 1203. In sum, the state court decisions generally hold that FEGLIA does not preempt all equitable state law principles due to (1) the lack of an anti-attachment provision as in SGLIA or the SBP law; and (2) the underlying policy rationale behind the implementation of FEGLIA.

D. FEGLIA Preemption of Virginia Code § 20–111.1(D)

1. Express Preemption

The express preemption provision in FEGLIA states that the provisions of any FEGLI contract shall preempt any state law that "relates to group life insurance to the extent that the [state law] is inconsistent with the contractual provisions." 5 U.S.C. § 8709(d)(1). This clause thus expressly preempts any state law that is inconsistent with the FEGLI master policy, which provides the insured an absolute right to designate the beneficiary that he or she chooses.

In this case, there is no *direct* inconsistency between that right and Code § 20–111.1(D), which provides a cause of action for the insured's spouse at the time of his or her death against a former spouse who receives payment of the death benefit "not for value." Va.Code § 20–111.1(D). While the Virginia statute may *indirectly* impact Mr. Hillman's beneficiary designation, there is a key distinction between beneficiary status and ultimate equitable entitlement once FEGLI proceeds have been paid out. *McCord*, 830 So.2d at 1193. Given that this Court must apply the federal preemption test in light of the United States Supreme Court's articulated deference to the paramount state interest in domestic relations, the Court finds that Virginia Code § 20–111.1(D) is not expressly preempted by 5 U.S.C. § 8709(d)(1).

2. Conflict Preemption

Virginia Code § 20–111.1(D) is impliedly preempted by FEGLIA if (1) the Virginia law actually conflicts with federal law, such that compliance with both statutes is impossible; or (2) the Virginia law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98. First, unlike *Ridgway* and *Dugan*, Code § 20–111.1(D) does not actually conflict with any procedure or right in FEGLIA—the Virginia law does not compel the insured to designate any particular beneficiary, and FEGLIA does not create a cause of action that could apply to an individual in Ms. Hillman's situation. If Ms. Hillman ultimately reaches the FEGLI proceeds, in contrast to *Dugan*, her actions would not be in direct contravention of any "plain and precise" requirement or "clear prohibition" expressly provided for in FEGLIA.

*9 Second, the House Report on the FEGLIA preemption provision explains that the provision was enacted "to eliminate all possibility of a conflict between Sections 7 and 8 of this Bill,[4] increasing levels of optional group life insurance available to employees, and any provision of state law limiting the amount of insurance which may be provided under a group insurance contract to citizens of the state." H.R.Rep. No. 96–1280 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3867, 3871. In addition, the

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[4] Sections 7 and 8 relate to additional optional life insurance for the insured and optional life insurance for the insured's family members. H.R.Rep. No. 96–1280, *reprinted in* 1980 U.S.C.CA.N. 3867

Senate clarified that it had two reasons for establishing the FEGLI order of precedence: (1) to avoid administrative difficulties; and (2) to avoid serious delays in paying insurance benefits to survivors. *See* S.Rep. No. 1064 (1966), *reprinted in* 1966 U .S.C.C.A.N.2070, 2071; *Kidd*, 821 S.W.2d at 569–72 (examining the legislative history of 5 U.S.C. § 8705) (stating that " § 8705 serves a valuable and worthwhile purpose by keeping the OPM and the insurance company out of legal entanglements."). A state law providing an equitable cause of action for the individual who was the insured's spouse at the time of his or her death, so that they may reach survivor benefits that a former spouse received "not for value," does not stand as an obstacle to Congress's stated objectives in enacting FEGLIA.

Furthermore, Congress's inclusion of anti-alienation provisions in SGLIA and the SBP law, coupled with Congress's omission of a similar provision in FEGLIA, is demonstrative of Congress's intent to *not* make the payees of FEGLI proceeds exempt from state law causes of actions. *Sedarous*, 666 A.2d at 1367 ("FEGLIA's lack of an anti-attachment provision is the critical factor justifying, if not indeed compelling, the conclusion that *Ridway* does not govern the FEGLIA preemption issue."); *Kidd*, 821 S.W.2d at 571 ("[t]he omission of an anti-attachment clause supports a conclusion that nothing in FEGLIA dictates pre-emption of equitable state law principles."). If Congress intended FEGLIA to preempt equitable remedies, it would have expressly done so as it did with SGLIA and the SBP law.

3. Field Preemption

Even if Code § 20–111.1(D) is harmonious with FEGLIA, it may nevertheless be preempted if Congress had a "clear and manifest" intent of "complete ouster of state power" with respect to group life insurance for federal employees. *See Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963). *See also English v. Gen. Elec. Co.*, 496 U.S. at 79 (stating that preemption is implied when a pervasive scheme of federal regulation makes it reasonable to infer that Congress intended exclusive federal regulation of the field). As stated in the preceding section, Congress's omission of an anti-alienation provision in FEGLIA is one indication that Congress did not intend to completely occupy the field.

In addition, the United States Supreme Court has held that the preemption statute contained in the Federal Employees Health Benefits Act ("FEHBA"), which is almost identical to 5 U.S.C. § 8709(d)(1), does not completely preempt state law with respect to that field. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 680 (2006). That preemption clause provided:

> ***10** The terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(l). The language of the FEHBA preemption provision—"which relates to health insurance or plans"—is even broader than the FEGLIA preemption provision language—"which relates to group insurance to the extent that the law or regulation is inconsistent with the contractual provisions." Therefore, given the Supreme Court's conclusion in *McVeigh*, that Congress placed an express *limitation* on the reach of the FEGLIA preemption clause, and that FEGLIA lacks an anti-alienation provision, the Court finds that Congress did not intend exclusive federal regulation of the field at issue.

CONCLUSION

For the reasons set forth above, the Court holds that Virginia Code § 20–111.1(D) is not preempted by FEGLIA, and thus Ms. Maretta's Plea in Bar/Demurrer is hereby overruled. Ms. Maretta's exceptions to the Court's ruling are noted for each of the reasons ably articulated by her counsel on brief and at the May 7, 2010 hearing.

Very truly

Judge Michael F. Devine

Va.Cir.Ct.,2010.
Hillman v. Maretta
Not Reported in S.E.2d, 80 Va. Cir. 439, 2010 WL 7373701 (Va.Cir.Ct.)

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 11-1221

IN THE

Supreme Court of the United States

JACQUELINE HILLMAN,

Petitioner,

v.

JUDY A. MARETTA,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION

George O. Peterson
Counsel of record
Tania M. L. Saylor
Michael M. Marr
Peterson Saylor, PLC
4163 Chain Bridge Road
Fairfax, VA 22030
703-225-3620
gpeterson@petersonsaylor.com
Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

The Federal Group Life Insurance Act ("FEGLIA"), 5 U.S.C. § 8701, *et seq.*, provides life insurance to federal employees. FEGLIA contains a statutory order of precedence for payment of benefits identical to the one considered by this Court in *Ridgway v. Ridgway*, 454 U.S. 46 (1981) under the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"). Unlike SGLIA, FEGLIA contains an express preemption provision. Federal regulations, similar to those considered in *Ridgway*, state that the right of a federal employee to designate the person of his or her choosing cannot be restricted in any way.

In 2007, the Virginia General Assembly, similar to only eleven other states, amended its statute that automatically revokes a beneficiary designation for death benefits upon entry of a decree of divorce to provide a statutory cause of action if the application of the statute is otherwise preempted by federal law. The Virginia Supreme Court, as the only state or federal appellate court to address this particular statutory provision, held that the statute was preempted by FEGLIA.

Within that framework, the question is:

Whether a state legislature may create a statutory cause of action that imposes absolute liability against the designated beneficiary of FEGLIA benefits when FEGLIA otherwise preempts application of a state's statutory scheme to automatically revoke a beneficiary designation.

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BRIEF FOR RESPONDENT IN OPPOSITION

The Virginia Supreme Court interpreted the scope of federal preemption under FEGLIA consistent with this Court's decision in *Ridgway*, the unanimous federal courts and the Supreme Court of Alabama. While the Virginia Supreme Court's decisions may be at odds with other (mostly intermediate) state appellate court decisions on the scope of FEGLIA preemption, this case is not the appropriate vehicle for this Court to weigh in on the issue.

Petitioner casts the issue presented in this case far too wide. While she does an admirable job of suggesting that the Virginia Supreme Court's decision fits within an apparent split of authority between consistent federal case law and other, mostly intermediate state appellate court decisions, the present case is entirely unique as it is the sole case addressing FEGLIA preemption of a state statutory cause of action. The Virginia Supreme Court's decision, while consonant with this Court's guidance in *Ridgway* and unanimous federal case law, was based on an interpretation of a very specific statutory scheme shared by only eleven other states. The Virginia Supreme Court, however, is the only state appellate court or federal court, to rule on this particular statutory scheme and there is no reason to believe that other courts reviewing the handful of similar statutes in other states will not arrive at the same conclusion as the Virginia Supreme Court.

Petitioner fails to address the key distinction between the Virginia Supreme Court's decision and

nearly every case she cites related to FEGLIA preemption. In almost all instances, those cases were based on either a property settlement agreement or divorce decree to which the deceased federal employee was a party. None of the cases cited involve a statutory scheme similar, or even dissimilar, to the one ruled upon by the Virginia Supreme Court. Given the propensity for this Court, and properly so, to rule upon only the issues that are presently before it, a review of the Virginia Supreme Court's decision in this case is not likely to settle or resolve the particular issues that have been the subject of conflicts between unanimous federal court decisions and some state decisions on the scope of FEGLIA preemption. The question in those cases, as opposed to the present one, would be properly cast as:

> Whether a former spouse or child can maintain a post-payment remedy when a federal employee disregards a contractual obligation or a court order and changes the beneficiary designation on his or her FEGLI life insurance policy.

That is a far different question than the one presented by this case. Put simply and plainly, this Court's decision, upholding or reversing a finding of federal preemption, on whether a state legislature can statutorily mandate a result different from the preemptive effect of federal law is not likely to provide any overarching guidance to state and federal courts in the typical scenario. Those cases dealt with whether a court can fashion a post-

payment remedy to enforce the bargain made by a federal employee in a contract or marital settlement agreement or uphold the requirements of an obligation of the decedent set forth in a divorce decree. In this light, this case presents a poor vehicle for this Court to address the scope of FEGLIA's preemptive effect.

While the Petitioner fails to appropriately acknowledge the distinction between the present case and the other federal and state FEGLIA preemption decisions, she goes entirely too far in suggesting that this Court invited the instant petition in footnote 10 of *Kennedy v. Dupont Savings and Investment Plan*, 555 U.S. 285, 299 (2009). *See* Pet. p. 6, 20-22. To be clear, the Virginia Supreme Court's ruling was limited to whether FEGLIA preempted application of a Virginia statutory provision. It did not rule on any other federal law, nor could it have since the Virginia Supreme Court's analysis was necessarily premised on the particulars of FEGLIA preemption. *Kennedy* involved a wholly different statutory scheme of the Employee Retirement Income Security Act of 1974 ("ERISA"). The case was about the interpretation of the "plan document rule" under ERISA and whether a plan administrator was required to look beyond its own plan documents to pay death benefits.[1]

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[1] The Virginia Supreme Court was not called upon to determine whether ERISA preempted Virginia Code § 20-111.1 (D) and, given that its determination was limited to the statutory framework of FEGLIA, it is all but certain how the Virginia Supreme Court would rule in the context of a properly appealed ERISA case. A determination of whether ERISA preempts application of Virginia Code § 20-111.1(D) would likely entail a careful review of the actual plan documents at

Consistent with this Court's approach of deciding only the issue before it, the Court simply stated in footnote 10 in *Kennedy* that it was leaving open the question of whether an aggrieved party might maintain a post-payment action for proceeds of an ERISA-governed benefits plan once those benefits were paid in accordance with the ERISA-based "plan documents." That footnote can hardly be seen as an invitation from this Court to decide application of federal preemption to the payment of FEGLIA benefits. More importantly, a decision on whether federal law preempts application of a Virginia statutory scheme is not likely to settle the issue left open in *Kennedy* as it relates to the separate and distinct laws of ERISA, particularly given the unique fact pattern in which those cases tend to arise. Any vehicle for settling that question ought to percolate among the lower courts in the discrete context of ERISA and based upon the separate reach of its statutory scheme.

Finally, assuming that this Court views the Virginia Supreme Court's sole interpretation of this unique statutory scheme as being worthy of granting *certiorari*, this Court should do so understanding that the Virginia Supreme Court's decision was unquestionably correct. Absent from section IV of the Petition for Certiorari is a recognition of the absolute right of a federal employee to designate the beneficiary of his or her choosing under federal law and regulation. Coupled with the statutory order of

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issue and the scope of ERISA preemption as intended by Congress.

precedence in FEGLIA and the express preemption provision in FEGLIA, the absolute right of a federal employee to designate the beneficiary of his or her choosing compels a finding that federal law preempts Virginia's statutory scheme as it relates to FEGLIA.

STATEMENT OF THE CASE

I. Background on The Federal Group Life Insurance Act

FEGLIA was passed by Congress in 1954 to provide low-cost group life insurance to federal employees. H.R.Rep. No. 2579, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 3052. FEGLIA authorizes the United States Office of Personnel Management (OPM) to purchase a group policy through private life insurance companies. 5 U.S.C. § 8709(a). As part of the act, Congress authorized the OPM to "prescribe regulations necessary to carry out" FEGLIA's purposes. 5 U.S.C. § 8716.

FEGLIA contains a statutory "order of precedence" which mandates how proceeds of life insurance benefits must be paid. 5 U.S.C. § 8705. That statutory order of precedence, in relevant part, states as follows:

> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in [the employing office or, in some cases, the OPM]. *For this purpose,*

> *a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.*
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee.
>
> ...

5 U.S.C. § 8705(a) (emphasis added). The OPM promulgated a regulation underscoring a federal employee's unrestricted right to designate or change his policy's beneficiary: "A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary. *This right cannot be waived or restricted.*" 5 C.F.R. § 870.802(f)[2] (emphasis added).

FEGLIA itself also contains an express preemption clause which provides that

> [t]he provisions of any contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is

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[2] This particular regulation has been redesignated as 5 C.F.R. § 870.802(f). The cases cited below, however, were based on the identical regulation prior to being redesignated.

> inconsistent with the contractual provisions.

5 U.S.C. § 8709(d)(1).

II. Virginia Code § 20-111.1 and Automatic Revocation of Beneficiary Designations

Prior to 2007, federal law clearly preempted the operation of Virginia Code § 20-111.1 as to death benefits paid under FEGLIA. Specifically, when applied to ordinary insurance contracts § 20-111.1 operates to write a spouse out of a beneficiary designation for death benefits upon entry of a divorce decree.[3] As conceded by the Petitioner in all stages of the litigation, but for the 2007 amendment to Virginia Code § 20-111.1, that section would have been preempted as to any insurance proceeds paid under FEGLIA.

Borrowing from a revision of the Uniform Probate Code published by the National Conference of Commissioners on Uniform State Law, the Virginia General Assembly amended the statute to include subsection D, which states:

> If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is

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[3] The only exception to the statute, at least as to non-FEGLIA death benefits, was if the divorce decree provided for a contrary result or the designation was in favor of a trust. Neither of those circumstances is applicable here.

> not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

In essence, subsection D purports to create a cause of action where federal preemption would bar application of the statute; and the purported cause of action dictates the same result as if federal preemption had no meaning or effect at all.

The statutory cause of action in subsection D ignores the intent of the deceased federal employee in regards to FEGLIA benefits and simply overrides the effect of a deceased federal employee's beneficiary designation.

The purported cause of action birthed by § 20-111.1(D) is the basis upon which the Complaint initiating the action below was premised.

III. Facts Underlying the Present Case and Case Below

Warren Hillman ("Decedent"), a federal employee, was afforded life insurance coverage under FEGLIA. On December 2, 1996, seven years into their marriage, Decedent designated Judy A. Maretta ("Respondent") as the beneficiary of his FEGLIA policy. Appendix to Petition ("App.") 4a. Decedent and Respondent divorced in 1998. *Id.* Their property settlement agreement and the divorce decree were silent as to either party maintaining the other as a beneficiary of life insurance.

In October 2002, Decedent then married Jacqueline Hillman ("Petitioner"). App. 4a. The Decedent never changed his beneficiary designation from Respondent. Decedent died in July 2008, while still married to Petitioner. *Id.* Petitioner filed a claim for the death benefit ("Death Benefit") from the Decedent's FEGLIA policy, but was notified that the benefit would be paid in accordance with the Decedent's 1996 designation as required by federal law. *Id.*

In her Complaint for Recovery of Death Benefit from Federal Employees' Group Life Insurance Policy ("Complaint") filed in the Circuit Court of Fairfax County, Virginia, Petitioner asserted that while the Death Benefit must be paid to Respondent pursuant to federal law, she could nonetheless maintain a cause of action against Respondent for the amount of the proceeds under Virginia Code § 20-111.1(D).

In response to the Complaint, Respondent maintained that FEGLIA contained a broad and express preemption provision which barred Petitioner's claims under Virginia Code § 20-111.1(D). Respondent relied upon FEGLIA's "order of precedence" for payment to beneficiaries, which specifically states that policy proceeds should be paid first to the designated beneficiary of the policy, and then to the widow "if there is no designated beneficiary." 5 U.S.C. § 8705. Respondent also asserted that federal law specifically recognized that the Decedent had an absolute right to name the beneficiary of his choosing, 5 C.F.R. § 870.802(f), and

therefore the scope of FEGLIA's "order of precedence" went beyond mere administrative convenience to the OPM.

The Circuit Court of Fairfax County rejected Respondent's position. The Virginia Supreme Court reversed the Fairfax County Circuit Court and found that federal law preempted application of Virginia Code § 20-111.1(D) on January 13, 2012.

Although eleven other states have a similar statutory provision,[4] the Virginia Supreme Court is the only court (state appellate court or federal court) to address federal preemption in the context of this particular statutory scheme.

REASONS FOR DENYING THE PETITION

I. No Other Court Has Ruled Upon FEGLIA Preemption Based Upon a Statute Similar to Virginia's Provision and Any Decision In This Case Is Not Likely to Settle The Issue Raised in Various FEGLIA Preemption Cases Cited by Petitioner

The narrow issue decided by the Virginia Supreme Court was whether Virginia Code § 20-111.1(D) was preempted by the terms of FEGLIA. None of the FEGLIA preemption cases cited by Petitioner arise out of a statute, similar or

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[4] Neither Maryland nor the District of Columbia, both with a high concentration of federal employees, has a statutory provision that automatically revokes a beneficiary designation for a life insurance policy upon divorce.

dissimilar, to Virginia Code § 20-111.1(D) and the impact of this Court's ruling upon Virginia's particular statutory scheme is not likely to settle the issues raised in those other cases. Although only eleven other states have a statute similar to Virginia Code § 20-111.1(D), the Virginia Supreme Court is the first court, state or federal, to address the issue and therefore, contrary to the position of the Petitioner, there is no split of authority on application of FEGLIA preemption to the statute in question here.

A. Petitioner Fails to Acknowledge That Nearly Every Other FEGLIA Preemption Case Cited Dealt With An Instance Where the Deceased Federal Employee Was Contractually Bound or Ordered in a Divorce Decree to Maintain a FEGLIA Beneficiary Designation, As Opposed to the Instant Case Which Dealt With a Statutory Scheme

Petitioner cites nine, mostly federal, cases finding that FEGLIA preempts application of state common law remedies and ten state cases finding otherwise. Petitioner omits discussion of eight additional federal cases that are adverse to her position on the scope of FEGLIA preemption. None of the cases cited by Petitioner (or omitted by Petitioner) dealing with FEGLIA preemption of state law or regulation, however, arise from a statute as the present case does.

In almost every instance the prior FEGLIA preemption cases dealt with a circumstance where a federal employee had a contractual obligation to maintain a FEGLIA beneficiary designation in favor of a former spouse or was under a court order to maintain that designation. The seeming split between unanimous federal court cases finding preemption and majority of state court cases finding against preemption is a product of this distinct scenario.

That is not to say that the Virginia Supreme Court was wrong. It followed the guidance of this Court, the unanimous federal court authority and its sister court in Alabama in reaching its decision. But this case is not likely to be the appropriate vehicle for resolving the specific issue in which nearly all other FEGLIA preemption cases have arisen. Even if this Court weighed in on the scope of preemption as applied to this particular statute in Virginia, it is certainly conceivable that a state court bound and determined to ignore the scope of FEGLIA preemption would simply distinguish this Court's decision based upon the typical fact pattern in which the other FEGLIA preemption cases have arisen, i.e. this case involved an automatic statute whereas a subsequent case involved a federal employee who violated a contractual obligation to an ex-spouse or child or state court order.

A review of each and every other FEGLIA preemption case decided by lower federal courts and state appellate courts reveals that they arose in dissimilar contexts such that even if this Court construed the nature of FEGLIA preemption in the

context of Virginia's unique statutory scheme, it would not necessarily resolve the broader issue of FEGLIA preemption.

Those cases can be catalogued as follows:

1. Factual Scenario in Cases Finding FEGLIA Preemption:[5]

Metro. Life Ins. Co. v. Zaldivar, 413 F.3d 119 (1st Cir. 2005) (children's claim preempted by FEGLIA despite federal employee agreeing to maintain children as beneficiaries of life insurance policy and court order directing the same)

Metro. Life Ins. Co. v. Christ, 979 F. 2d 575 (7th Cir. 1992) (children's claims preempted by FEGLIA despite deceased federal employee being under court order requiring federal employee to maintain his children as beneficiaries; proceeds payable to new wife since federal employee failed to file any beneficiary designation)

Dean v. Johnson, 881 F.2d 948 (10th Cir. 1989) (wife's claim preempted by FEGLIA where state domestic relations order mandated deceased husband maintain her as beneficiary during pendency of divorce); *see also Metro. Life Ins. Co. v.*

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[5] Petitioners parenthetical citation to *Fernbaugh v. Metro Life Ins. Co.*, CV-061361, 2006 U.S. Dist. Lexis 67765 (M.D. Pa. Sept. 21, 2006) on p. 20 of the Petition is misleading. That case rested on whether or not a plaintiff's statutory claim for bad faith against Metropolitan Life Insurance Co. under Pennsylvania law was preempted. The case did not deal with a state law "equitable claim" or an issue of FEGLIA preemption remotely similar to any of other cited case.

McMorris by McMorris, 786 F.2d 379 (10th Cir. 1986) (similar decision by Court of Appeals for the 10th Circuit) (neither are cited by Petitioner)

O'Neal v. Gonzalez, 839 F.2d 1437 (11th Cir. 1988) (FEGLIA preemption of claim as to decedent's non-domestic relations contractual obligation)

Faris v. Long, 2008 WL 2117243 (E.D. Tenn. May 20, 2008) (not cited by Petitioner) (claim preempted by FEGLIA despite state court order barring deceased federal employee from changing beneficiary designation)

Metro. Life Ins. Co. v. Barber, CIV.A.5:01-CV-025-C, 2001 WL 1683253 (N.D. Tex. Sept. 7, 2001) (FEGLIA preemption of state court order requiring deceased federal employee to designate ex-spouse and children as beneficiaries)

Metro. Life Ins. Co. v. Pearson, 6 F. Supp. 2d 469 (D. Md. 1998) (constructive trust remedy preempted despite property settlement agreement requiring ex-wife and children to be designated as beneficiaries of life insurance)

Metro. Life Ins. Co. v. Armstrong-Lofton, 19 F. Supp. 2d 1134, 1135-36 (C.D. Cal. 1998) (FEGLIA preemption of spouse's claim that she was never legally divorced and that she was entitled to share of life insurance proceeds because premiums paid from community property funds)

Metro. Life Ins. Co. v. Thompson, 968 F. Supp. 312 (S.D. Miss. 1997) (not cited by Petitioner) (claims by deceased federal employee's children preempted

despite beneficiary of FEGLIA policy waiving rights in a prenuptial agreement)

Matthews v. Matthews, 926 F. Supp. 650 (N.D. Ohio 1996) (not cited by Petitioner) (FEGLIA preempted ex-wife's claim despite the fact that separation agreement as incorporated into divorce decree required federal employee to maintain ex-wife as beneficiary)

Metro. Life Ins. Co. v. Bell, 924 F. Supp. 63, 64 (E.D. Tex. 1995) (ex-spouse's claim preempted by FEGLIA despite California state court declaration that policy was "overlooked as a community property asset")

Lewkowicz v. Lewkowicz, 761 F. Supp. 48 (E.D. Mich. 1991) (not cited by Petitioner) (FEGLIA preempted estate's claims despite divorce decree extinguishing ex-wife's claims to deceased federal employee's life insurance proceeds)

Mercier v. Mercier, 721 F. Supp. 1124 (D. N.D. 1989) (minor child's claim preempted by FEGLIA despite divorce decree requiring deceased federal employee to maintain beneficiary designation in favor of child)

Metro. Life Ins. Co. v. McShan, 577 F. Supp. 165 (N.D. Cal. 1983) (not cited by Petitioner) (children's claims preempted by FEGLIA despite state court divorce decree requiring deceased federal employee to maintain children as beneficiaries)

Knowles v. Metro. Life Ins. Co., 514 F. Supp. 515 (N.D. Ga. 1981) (not cited by Petitioner) (ex-spouse's claim preempted as to federal employee's FEGLIA proceeds despite property settlement agreement and

divorce decree requiring decedent to designate ex-spouse as beneficiary)

Metro. Life Ins. Co. v. Potter, 533 So. 2d 589 (Ala. 1988) (FEGLIA preemption despite state court order requiring deceased federal employee to maintain ex-wife as beneficiary)

2. Factual Scenario in Cases Finding No FEGLIA Preemption:

Hardy v. Hardy, 963 N.E.2d 470 (Ind. 2012) (no FEGLIA preemption where property settlement agreement incorporated into final decree of divorce required deceased federal employee to maintain FEGLI policy in favor of ex-wife and grandchildren)

Bell Estate ex rel. Bell v. Bell, 2007-CA-001050-MR, 2009 WL 350607 (Ky. Ct. App. Feb. 13, 2009) (unpublished intermediate state appellate court decision finding FEGLIA did not preempt new wife's claim that deceased federal employee intended to change his beneficiary designation)[6]

Fagan v. Chaisson, 179 S.W.3d 35, 38 (Tex. App. 2005) (intermediate state appellate court decision finding no FEGLIA preemption of ex-spouse's claim where property settlement agreement incorporated

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[6] It is somewhat surprising Petitioner would cite this particular unpublished opinion other than to perhaps bolster an incorrect suggestion that there are an equal number of cases for and against her position. The case is so clearly contrary to federal law and it is not even supported by the other state cases finding no preemption.

into decree of divorce awarded ex-spouse 50% of deceased federal employee's retirement benefits)

McCord v. Spradling, 830 So. 2d 1188 (Miss. 2002) (estate could maintain breach of contract action against widow for receipt of FEGLI proceeds where she waived rights in antenuptial agreement and beneficiary designation on file named decease's pre-deceased first wife as beneficiary)

Kidd v. Pritzel, 821 S.W.2d 566 (Mo. Ct. App. 1991) (intermediate state appellate court decision finding no FEGLIA preemption where deceased federal employee agreed in property settlement agreement to maintain his four children as beneficiaries of his life insurance)

Eonda v. Affinito, 15 Pa. D. & C.4th 142 (Com. Pl. 1991) *aff'd*, 427 Pa. Super. 317, 629 A.2d 119 (1993) (intermediate state appellate court decision finding no FEGLIA preemption where deceased federal employee agreed in property settlement agreement to maintain beneficiary designation)

In re Estate of Anderson, 195 Ill. App. 3d 644, 552 N.E.2d 429 (1990) (intermediate state appellate court decision finding no FEGLIA preemption of executor's claim where widow agreed in antenuptial agreement to waive rights to insurance proceeds)

Barden v. Metro. Life Ins. Co., 41 N.C. App. 135, 254 S.E.2d 271 (1979) (intermediate state court appellate decision finding no FEGLIA preemption where deceased federal employee agreed in separation

agreement to maintain ex-spouse as beneficiary of FEGLI policy)

Roberts v. Roberts, 560 S.W.2d 438 (Tex. Civ. App. 1977) (no FEGLIA preemption where deceased federal employee ordered in divorce decree to maintain children as FEGLI beneficiaries)

...

Based on the pattern in which nearly all of the of previous FEGLIA preemption cases have arisen, the present case arising solely out of an automatic statutory scheme regardless of the deceased federal employee's intent is unlikely to be the appropriate vehicle for deciding the larger issue of FEGLIA preemption.

Put simply, if this Court were to take this case and uphold the Virginia Supreme Court's decision that FEGLIA preempts application of Virginia Code § 20-111.1(D), a subsequent state court wrestling with the distinct issue of whether a former spouse or child whom the deceased federal employee was obligated by contract or court order to designate as a beneficiary can maintain a cause of action could base its decision on the distinction between the issue in this case and the fact that the deceased federal employee shirked a contractual obligation or duty imposed by a court order.

The motivation behind the contrary state court decisions finding no preemption can most clearly be seen in *Eonda v. Affinito*, in which the court stated:

> we are confident that Congress did not intend that the vast number of federal employees in this country be permitted to enter into voluntary, state court-sanctioned agreements concerning the care and welfare of their children and then shirk completely the duties imposed by those agreements.

Id. at 325-326.[7] But the similar factual patterns from the other state court cases cited by Petitioner suggest their decisions were similarly motivated by a desire to protect a party who had expectations from the deceased federal employee's contractual obligations or obligations imposed by a state divorce decree.

While those states finding no preemption have done so based upon an incorrect view of federal law, the motivation behind the contrary state court decisions is not present in this instance where a state's statute purports to automatically override by legislative fiat the federal employee's right to designate the beneficiary of his or her choosing. Given the potential, however, for a subsequent state court to find a way to distinguish a ruling by this Court in this case, this Petition presents a poor

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[7] This same rationale was rejected by this Court in *Ridgway* where it dealt with nearly identical statutory and regulatory language to the present case. 454 U.S. at 53, 102 S. Ct. at 54 (characterizing the Supreme Judicial Court of Maine rationale).

vehicle for deciding the broader issue of FEGLIA preemption.[8]

B. While It Is Correct That Eleven Other States Have Similar Statutory Provisions to the One Under Review By the Virginia Supreme Court, No Other State Appellate Court or Federal Court Has Addressed This Type of Statutory Scheme

Petitioner suggests that there is a widespread potential for the particular statutory scheme before the Virginia Supreme Court to come up in other jurisdictions. In reality, the number of states having similar statutory provisions is limited and there is hardly a nationwide movement toward additional states adopting this particular provision of the Uniform Probate Code. As of the filing of this Opposition, only eleven other states have a similar provision to the Virginia statute in question and there is no pending legislation in other states to adopt such a provision.[9]

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[8] Respondent will concede that this Court reversing the Virginia Supreme Court's decision in this case would likely mean that the unanimous federal court decisions and the Alabama Supreme Court finding preemption were wrongly decided. The reason being is that if this Court were to rule that a state's automatic statutory provisions can override FEGLIA, then the justification for finding FEGLIA preemption where a deceased federal employee was contractually obligated or under a court divorce decree to maintain a beneficiary designation would be on substantially less firm ground.

[9] NCCUSL tracks pending legislation and reports no states currently have pending legislation toward adoption. http://www.nccusl.org/Act.aspx?title=Probate%20Code.

Moreover, if the issue does come up in other jurisdictions, it is likely to come up in the context of ERISA. A review of the particular provision of the Uniform Probate Code, as embodied in Virginia Code § 20-111.1(D), reveals that the goal of the NCCUSL was not to address all federal laws in particular, but to address a potential way to get around this Court's ruling in *Eglehoff v. Eglehoff*, 532 U.S. 141 (2001).[10] The commentary to this particular section of the Uniform Probate Code (last amended in 2006) is as follows:

> Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

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[10] Interestingly, *Eglehoff* found ERISA preemption of a statute nearly identical to Virginia Code § 20-111.1 prior to the addition of Subsection D of the statute.

See Uniform Probate Code §2-804(h)(2).[11]

Notably the commentary limits the application and justification of this particular section to ERISA. While § 2-804(h)(2) is not limited on its face to ERISA preemption, the discussion in the commentary is exclusive to that particular federal law and the "unintended" results from application of ERISA. In the context of FEGLIA, which is not discussed in the commentary, it becomes rather difficult to reconcile the view that following a FEGLIA beneficiary designation somehow leads to "unintended" consequences when federal law expressly acknowledges the absolute right of a federal employee to designate the beneficiary of his or her choosing. *See* 5 U.S.C. § 8705(a); 5 C.F.R. § 870.802(f).

Even in regards to ERISA, the NCCUSL's rationale is flawed. The preceding paragraph to the commentary to subsection (h)(2) should call into question the entire analytical approach adopted by the NCCUSL on the proposed legislation.

The paragraph states as follows:

> It is to be hoped that the federal Courts will continue to show sensitivity to the primary role of state law in the field of

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[11] The Commentaries can be found at: http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.pdf, p. 188-190.

> probate and nonprobate transfers. To the extent that the federal Courts think themselves unable to craft exceptions to ERISA's preemption language, *it is open to them to apply local law concepts as federal common law*. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

(emphasis added).

As this Court is aware, the notion of applying "federal common law" in the scenario identified in the above-referenced commentary of the Uniform Probate Code was firmly rejected by this Court in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 at 303. The analytical approach by the NCCUSL in this field is questionable at best.

In any event, the fact that eleven other states have a similar provisions to Virginia Code § 20-111.1(D) is hardly a reason to take this case when no other state or federal appellate court has addressed this statutory scheme as to FEGLIA. There is no reason to believe that another court addressing the same issue will come to a conclusion different than the Virginia Supreme Court.

II. Petitioners Attempt to Cast This Case As Answering The Question Left Open By This Court's Decision in *Kennedy v. DuPont Savings and Investment Plan* Is Unavailing

While this Court left open the issue of whether post-payment claims could be maintained after payment of benefits by a plan administrator of ERISA benefits in footnote 10 of *Kennedy*, this can hardly be construed as a broad invitation by this Court to petition for a writ of certiorari on the conflict between a state statute and an entirely distinct federal statute. As bears repeating, the Virginia Supreme Court was not called upon to address whether Virginia Code § 20-111.1(D) is preempted by ERISA.

Its analysis was limited to the distinct federal statutory scheme under FEGLIA. A review of the Virginia Supreme Court's decision shows that the Court's analysis of whether FEGLIA preempted application of the Virginia statute at issue was grounded solely on FEGLIA, the unanimous federal court precedent and this Court's own guidance on this issue in *Ridgway v. Ridgway*.

Should this Court decide to resolve that which was left open by *Kennedy*, it seems elemental that the appropriate vehicle would be an ERISA-based case that has resulted in a significant appellate split among the lower courts.[12] Ruling on the issue in the

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[12] As of the filing of this brief, only one federal court of appeals has addressed footnote 10 of *Kennedy*. *See Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131 (3d Cir. 2012).

context of FEGLIA, particularly in this case, is not the appropriate vehicle to make broad pronouncements about the reach of ERISA preemption.

III. The Virginia Supreme Court Followed the Precedent Of This Court and the Unanimous Body of Federal Case Law Interpreting the Scope of FEGLIA to Find Virginia Code § 20-111.1(D) Was Preempted as to FEGLIA

Assuming that this Court views the narrow issue decided by the Virginia Supreme Court as worthy of certiorari, it should grant the writ to affirm the Virginia Supreme Court's decision.

A. This Court Has Already Weighed In On The Key Statutory Language at Issue

This Court dealt with a statute identical to FEGLIA's statutory order of precedence in *Ridgway v. Ridgway*.[13] That case, similar to nearly every FEGLIA preemption case cited by either Petitioner or Respondent, dealt with a state divorce decree that mandated a service member maintain benefits under a SGLIA policy in favor of his children. 454 U.S. at 48. The service member, contrary to the command of

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[13] SGLIA's statutory order of precedence was modeled after FEGLIA's statutory order of precedence. *Metro. Life Ins. Co. v. Christ*, 979 F.2d at 580. In other words, FEGLIA came first.

the divorce order, changed the beneficiary designation to his new wife. *Id.* The ex-wife filed suit asking for a constructive trust to be placed over the proceeds. The Supreme Judicial Court of Maine ruled in favor of the ex-wife. *Id.* at 50.

This Court granted a writ of certiorari and reversed. The focus of this Court's decision was the identical statutory order of precedence at issue in FEGLIA. Given that SGLIA, at issue in *Ridgway*, did not contain an express preemption provision like FEGLIA, this Court's analysis initially examined the Congressional record behind the statutory order of precedence. 454 U.S. at 50-53.

Despite the lack of an express preemption provision in SGLIA, this Court – looking at the statutory order of precedence and regulations found in both SGLIA (which are nearly identical to those found in FEGLIA) – stated of SGLIA that "[f]ederal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary." 454 U.S. at 59. Based upon a review of the statute at issue, this Court further stated that "Congress had spoken with force and clarity in directing that the proceeds [of a SGLIA policy] belong to the named beneficiary and no other." *Id.* 454 U.S. at 56.[14]

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[14] As a secondary and distinct basis, the Court relied upon the anti-attachment provision found in SGLIA. As discussed below in section III(D), the courts that have found no preemption have ignored the fact that the anti-attachment provision in SGLIA was a separate and distinct holding.

The same statutory analysis should be applied in this case.

B. The Unanimous Federal Courts, and the Supreme Courts of Alabama and Virginia Have Properly Followed This Court's Precedence in Finding Preemption Under FEGLIA

The seventeen other cases finding FEGLIA preemption have been catalogued previously. With the exception of *Knowles v. Metro. Life Ins. Co.*,[15] which was decided six months before this Court's decision in *Ridgway*, each of those cases have properly relied upon this Court's holding in *Ridgway* to find FEGLIA preempted post-payment claims.

Illustrative of this strong line of cases is the court's decision in *Metropolitan Life Ins. Co. v. Zaldivar*, 413 F.3d 119 (1st Cir. 2005), which noted:

> Because the applicable language of FEGLIA and SGLIA are very similar, a case construing the latter, such as *Ridgway*, is highly persuasive, if not binding, in construing the former.

Id. at 120. *See also*, *Maretta v. Hillman*, 283 Va. 34, 42, 722 S.E.2d 32, 35 (2012) ("We thus agree with those courts that have considered *Ridgway* to be 'highly persuasive, if not binding, in construing [FEGLIA].'").

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[15] *Knowles* relied upon a plain statutory analysis in concluding such claims were preempted by FEGLIA.

Petitioner attempts to distinguish the very clear precedent set by this Court in *Ridgway* by improperly focusing on the Court's discernment of Congressional intent in order to find SGLIA preempted the state-based cause of action at issue. But Petitioner's arguments fall short. First, as noted in *Metropolitan Life Ins. Co. v. Christ*, while this Court's decision in *Ridgway* mentioned "federal interests in military morale and national defense", *Ridgway's* "holding was grounded ultimately not on any perceived 'interests' that Congress was trying to pursue, but on the statutory language giving force to those interests." *Id.* at 580. A review of this Court's language in *Ridgway* demonstrates this to be unquestionably correct. 454 U.S. at 59.

Second, the apparent reason this Court in *Ridgway* referenced the legislative history was because SGLIA, unlike FEGLIA at issue here, does not contain an express preemption clause. *See Maretta v. Hillman*, 238 Va. at 44, S.E.2d at 37, fn. 3 ("In fact, Congress' preemption intent is more apparent in FEGLIA than in SGLIA, which contains no provision similar to 5 U.SC. § 8709(d)(1), citing *Metropolitan Life Ins. Co. v. Potter*, 533 So.2d at 594.[16]

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[16] *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-63 (2002) ("Because the FBSA contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.").

Petitioner notably omits a discussion of the absolute right of an insured under FEGLIA to name the beneficiary of his choosing as set forth in 5 C.F.R. § 870.802(f). Yet nearly an identical regulation was under consideration in *Ridgway* as set forth in 38 C.F.R. § 9.16(e) (now 38 C.F.R. § 9.4(b)). 454 U.S. at 53, 102 S. Ct. at 54 ("[f]ederal law *and federal regulations* bestow upon the service member an absolute right to designate the policy beneficiary") (emphasis added). The only difference between the two provisions is that FEGLIA's regulation goes further by adding the sentence: "This right cannot be waived or restricted."

Construed properly, it is clear that the Virginia Supreme Court's decision properly followed the precedent of this Court.

C. Petitioner's Arguments With Respect to the Scope of Preemption Miss the Point

Petitioner is in the unenviable position of asking this Court to view the nearly identical statutory and regulatory provisions between SGLIA and FEGLIA as somehow subject to differing interpretations. This Court premised preemption in *Ridgway* on virtually the same language under review in this case. Since SGLIA contained no express preemption provision, one would have to infer that the same interpretation would have to be given to identical language found in FEGLIA. A contrary conclusion would mean that Congress using the identical language in two similar statutory schemes intended different results.

If there were any doubt about whether Congress intended to preempt inconsistent state laws with respect to FEGLIA benefits (or payment of those benefits), the fact that Congress enacted an express preemption provision in FEGLIA should put that to rest. The express preemption provision found in FEGLIA was aptly described by *Metropolitan Life Ins. Co. v. Christ* as follows:

> This clause broadly preempts any state law that is inconsistent with the FEGLIA master policy.[17] The ordinary meaning of the term "relates to" is broad: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales*, 504 U.S. at ----, 112 S.Ct. at 2037 (quoting Black's Law Dictionary 1158 (5th ed. 1979). Moreover, a state law need not specifically address the subject of the federal law to relate to that subject: "[A] state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Id.* at ----, 112 S.Ct. at 2038 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, ----, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990)).

979 F.2d at 579.

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[17] Petitioner's argument with respect to the "master policy" is addressed below in section III(D)(1).

Petitioner cites several cases for the proposition that this Court has been reluctant to find preemption of state domestic relations law. But *McCarty v. McCarty*, 453 U.S. 210 (1981) and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), relied upon by *Ridgway* for this proposition, were conflict preemption cases rather than express preemption cases. All three cases, however, found that state domestic relations law was preempted as conflicting with federal law. Moreover, Petitioner cannot answer the very simple question: if FEGLIA's express preemption provision was not primarily designed to preempt state law with respect to domestic relations, then what area of state law was Congress intending to preempt? Contextually these controversies would almost only arise in the domestic relations arena. It is no coincidence that in 24 of the FEGLIA preemption cases cited, 22 dealt with domestic relations agreements or divorce decrees.

Finally, Petitioner, as she did below, continues to misinterpret the effect of this Court's decision in *Empire Healthchoice Assurance Inc. v. McVeigh*, 547 U.S. 677 (2006). *See* Pet. p. 37-38. But that case does not support Petitioner's contention that Virginia Code § 20-111.1(D) is not preempted. The issue in *McVeigh*

> *concerns the proper forum* for reimbursement claims when a Plan beneficiary [under Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. § 8901] injured in an accident, whose medical bills have been paid by the Plan administrator, recovers

> damages (unaided by the carrier-administrator) in a state-court tort action against a third party alleged to have caused the accident.

McVeigh, 547 U.S. at 682 (emphasis added). Although FEHBA contained a preemption clause "displacing state law on issues relating to 'coverage or benefits'" under the plan, *id.* at 683, there was no express provision in FEHBA that addressed the forum for vindicating the insurance carrier's reimbursement rights. *Id.* at 693.[18] Ultimately, the carrier waited for the state court personal injury suit to settle and then filed suit in federal court for the full amount the carrier paid for the beneficiary's medical care. *Id.* The sole issue before the Court was whether the insurer's claim could be said to arise under federal law such that 28 U.S.C. § 1331[19] conferred federal court jurisdiction.

After finding no express provision in FEHBA authorizing federal court jurisdiction, this Court examined the argument that FEHBA's preemption clause was a jurisdiction-conferring provision. *McVeigh*, 547 U.S. at 697. This Court found that the preemption provision was not "sufficiently broad to confer federal jurisdiction." *Id.* at 698. At best, *McVeigh* stands for the proposition that a

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[18] This Court stated "[i]t is undisputed that Congress has not expressly created a federal right of action enabling insurance carriers like Empire to sue health-care beneficiaries in federal court to enforce reimbursement rights under contracts contemplated by FEHBA." *McVeigh*, 547 U.S. at 693.

[19] Section 1331 authorizes federal court jurisdiction over "civil actions arising under ... laws of the United States."

preemption clause in a federally enacted statute is not sufficient to confer federal court jurisdiction absent an explicit directive from Congress. It does not, as Petitioner suggests, address the breadth of the express preemption provision in FEGLIA as applied to Virginia Code § 20-111.1(D).

D. The State Courts That Have Found Against FEGLIA Preemption Have Misapplied This Court's Precedence

Petitioner concedes, as she must, that *Ridgway* had a distinct and separate ground for finding preemption based upon the anti-attachment provision found in SGLIA. FEGLIA has no anti-attachment provision. Petitioner's concession that the anti-attachment provision in SGLIA was a separate and distinct holding is inescapable based on a clear reading of this Court's decision in *Ridgway*. In section III of the Court's opinion, the Court already held that the statutory language and regulatory language in SGLIA compelled a finding of preemption. In section IV of this Court's opinion, it examined the anti-attachment provision in SGLIA and prefaced as follows:

> [t]he imposition of a constructive trust upon the insurance proceeds is *also* inconsistent with the anti-attachment provisions [in SGLIA].

454 U.S. 57. (emphasis added).

Notably, the state court decisions finding against preemption under FEGLIA have generally

done so by improperly relying upon the lack of an anti-attachment provision in FEGLIA to distinguish *Ridgway*. *See Maretta v. Hillman*, 283 Va. at 46, 722 S.E.2d at 38 ("State courts distinguishing *Ridgway* also fail to acknowledge what is apparent from a plain reading of the decision, i.e., that its holding based on SGLIA's anti–attachment provision was a separate, independent basis for the result.")

Petitioner plainly recognizes the state court precedent (mostly intermediate appellate courts) she relies upon is problematic, and therefore suggests an unsupportable reading of this Court's decision in *Ridgway*. *See* Pet. p. 32-35. According to Petitioner, all can be reconciled by making a distinction between pre-payment and post-payment claims. Yet there is nothing in *Ridgway's* analysis of the nearly identical statutory order of precedence or regulations under consideration in SGLIA that lends any support to that argument. In point of fact it is a distinction without any real difference. To the contrary of Petitioner's assertion, this Court hinted (in the section of the opinion preceding the discussion of the anti-attachment provision in SGLIA) that the ex-wife might have a claim against her deceased ex-husband's estate for shirking his obligation under the state court divorce decree. *See* 454 U.S. at 59 ("As the trial court intimated, respondents may have a claim against the insured's estate for that breach...."). Such a claim against the decedent's estate would necessarily require the actual proceeds of the SGLIA policy to have been paid to another.

Notably, no federal court has found that purported distinction of any significance. For

instance, in *Metropolitan Life Insurance Co. v. Bell*, the Eastern District of Texas stated, "[h]owever, there is an argument to be made that a constructive trust placed on the proceeds after a beneficiary received them would not be inconsistent with [Section 8709(d)(1)]. Notably, other courts have *not* interpreted FEGLIA in this manner." 924 F. Supp. 2d 63, 65 (E.D. Tex. 1995) (emphasis added).

Instead, a number of courts have rejected the view that a state law claim could be made for the proceeds once paid. In *Lewkowicz v. Lewkowicz*, 761 F. Supp. 48 (E.D. Mich. 1991), a decedent's ex-wife was paid FEGLI insurance proceeds despite a divorce decree expressly stating that all beneficiary designations for insurance contracts or policies were extinguished. The decedent's surviving spouse then sued the ex-wife for the proceeds. The Court applied the preemption provision in FEGLIA and awarded summary judgment in favor the ex-wife. *Id.* at 49-50. Similarly, a claim for a decedent's FEGLIA policy proceeds after they were paid was rejected in *Mercier v. Mercier*, 721 F. Supp. 1124 (D. N.D. 1989). In *Mercier* the plaintiff asserted that a state divorce decree mandated the decedent to maintain life insurance for the benefit of his minor children. The Court rejected that theory as it violated the decedent's absolute right to designate the beneficiary of his choosing. *Id.* at 1127.

Petitioner's view of the case ignores this Court's holding in *Ridgway* and the Court's actual focus on the textual words in the statute and regulations. Petitioner would ask this Court to ignore the scope of federal law and regulations by

suggesting the right of a federal employee to name the beneficiary of choosing without restriction goes no further than writing a name on a piece of paper. But the absolute right must necessarily go beyond the mere ability to write a name on a piece of paper. The right must have some actual effect and substance. As the Alabama Supreme Court recognized in *Metropolitan Life Insurance Company v. Potter*:

> It must be assumed that the federal provisions regarding designation of beneficiaries were intended to confer on the insured more than the right to do a meaningless act. If the proceeds are to go to someone other than the designated beneficiary the act of so designating serves no purpose.

Id. 533 So.2d at 597.

E. Petitioner's Remaining Contentions Are Without Merit

Petitioner makes a series of passing assertions toward the end of the Petition. Each is without merit.

1. OPM Policy

Petitioner suggests that the Virginia Supreme Court "refused to acknowledge the 50-page contract which OPM negotiated with Metropolitan Life Insurance Company." Pet. p. 37-38. Petitioner then goes on to broadly stated "[t]herefore, the Supreme

Court of Virginia could not have possible applied 5 U.S.C. § 8709(d)(1) in this case properly..." Pet. p. 38. Petitioner, however, is incorrect. The Virginia Supreme Court, citing *O'Neal v. Gonzalez*, 839 F.2d at 1440, noted in footnote 1 of its opinion that the "insurance policy is not a traditional contract between an insured and the insurer but a federal policy governed by federal law." *Id.* 283 Va. 38, 722 S.E.2d at 39. *See also*; *Knowles v. Metro. Life Ins. Co.*, 514 F. Supp. 515, 516 (N.D. Ga. 1981). Accordingly, the Virginia Supreme Court properly understood the contractual provisions at issue were actually the embodiment of federal law.

In any event, the absence of the OPM Master Policy from the record would not have helped Petitioner as the contract expressly incorporates all federal statutes and regulations.[20] It would seem somewhat absurd to think that OPM was authorized under 5 U.S.C. § 8709 to acquire life insurance for federal employees, but somehow the contract for life insurance would not incorporate the requirements of federal law or regulations promulgated by OPM.

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[20] Should the Court take up Petitioner's offer to provide a copy of the contract, Respondent would direct the Court to Section 23, on page 39 of the contract, which states:

CONFORMITY WITH LAW. -- If any provisions required by chapter 87 of title 5, United States Code, 5 CFR Part 870 to be contained in this Policy are not specifically contained herein, then such provisions shall be deemed to part of this Policy as though set forth herein at length.

2. 1998 Amendment to FEGLIA

Petitioner remarkably makes the assertion that somehow the 1998 amendment to FEGLIA supports the conclusion that Congress did not intend to preempt "all state equitable remedies." Pet. p. 35-36. The amendment at issue is found in 5 U.S.C. § 8705(e). Essentially, it says that the if a divorce decree requires a federal employee to designate a beneficiary, then the sole way in which that designation can be protected is by filing the divorce decree with OPM before the decedent's death.

But far from suggesting Congress intended to express a view that post-payment equitable remedies were free from the preemptive force of FEGLIA, this amendment states a very limited exception to the statutory order of precedence. The Court in *Metro. Life Ins. Co. v. Zaldivar*, 337 F. Supp. 2d 343, 348 (D. Mass. 2004) *aff'd*, 413 F.3d 119 (1st Cir. 2005), recognized and rejected a similar argument, stating:

> In amending FEGLIA to permit court decrees in divorce settlements to govern the designation of beneficiaries to FEGLIA life insurance policies, Congress recognized the importance of allowing state courts to have power over the disbursement of FEGLIA insurance proceeds for the benefit of families and children *under specific, limited conditions*. Congress could just as easily have amended FEGLIA to allow *all* state court decrees in divorce

> settlements, as well as other equitable remedies, to change the designation of beneficiaries, regardless of whether the employing agency received notice of the order. Congress did not do so. The language of the statute explicitly and clearly provides that the employing agency must (1) receive a copy of the court order (2) before the death of the insured.

337 F. Supp. 2d at 348. *See also, Metro. Life Ins. Co. v. Holland*, 134 F. Supp. 2d 1197, 1200 (D. Or. 2001). Accordingly, the stronger view is that Congress intended only to apply a very limited exception to the federal employee's absolute right to designate the person of his or her choosing.

CONCLUSION

For the foregoing reasons, the Petition for Writ or Certiorari should be denied.

Respectfully submitted,

George O. Peterson
Counsel of record
Tania M. L. Saylor
Michael M. Marr
Peterson Saylor, PLC
4163 Chain Bridge Road
Fairfax, VA 22030
703-225-3620
gpeterson@petersonsaylor.com
Counsel for Respondent

Dated: May 18, 2012

REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-1221

In the Supreme Court of the United States

JACQUELINE HILLMAN,

Petitioner,

v.

JUDY A. MARETTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF IN OPPOSITION

Daniel H. Ruttenberg
Counsel of Record
SmolenPlevy
8045 Leesburg Pike, Fifth Floor
Vienna, VA 22182
dhruttenberg@smolenplevy.com
(703) 790-1900

Counsel for Petitioner *Dated:* May 29, 2012

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REPLY TO BRIEF IN OPPOSITION

Ex-Wife understandably does not want this Court to grant Widow's Petition for a Writ of Certiorari. However, her arguments suggesting that this case does not fall within the split of authority among federal and state courts with regard to Federal Employees Group Life Insurance Act of 1954 ("FEGLIA") preemption and that this case does not raise an important national issue are weak, at best.

Ex-Wife is simply attempting to confuse the important widespread issue raised in this case - that this Court has not directly ruled on FEGLIA preemption. Accordingly, lower courts are left to look to either this Court's opinion in *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (analyzing the Servicemen's Group Life Insurance Act of 1965 ("SGLIA")) or this Court's opinions in *Egelhoff v. Egelhoff*, 532 U.S. 131 (2001) and *Kennedy v. Dupont Savings and Investment Plan*, 555 U.S. 285, 299 (2009) (analyzing the Employee Retirement Income Security Act of 1974 ("ERISA")) for guidance. A lower court could rationally apply either line of reasoning to FEGLIA cases, which is why there is such a pervasive split in authority. This Court needs to put an end to this needless nationwide litigation by opining in this case, so federal and state courts across the country will know which analysis to

apply in FEGLIA cases. At a minimum, this Court should Call for the Views of the Solicitor General with regard to whether the question presented in this case raises an important enough issue to warrant the granting Widow's Petition for a Writ of Certiorari.

I. THIS COURT ADDRESSING THE QUESTION PRESENTED IN THIS CASE WOULD RESOLVE THE SPLIT IN AUTHORITY AMONG THE FEDERAL AND STATE COURTS WITH REGARD TO FEGLIA PREEMPTION.

It is reasonable for Ex-Wife not to highlight the split in authority among the federal and state cases which have addressed FEGLIA preemption (the "FEGLIA Cases") as such a split makes this case a strong candidate for review.[1] However, Ex-Wife goes entirely too far when she, at great length, tries to use meaningless "distinctions" between this case and the FEGLIA Cases in an attempt to discourage this Court from granting

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[1] On May 21, 2012, yet another opinion regarding FEGLIA preemption of an equitable remedy, *Parrott-Horjes v. Rice*, --- P.3d ---, 2012 WL 1816189 (Wash. App. Div. 1), was published adding to the nationwide split of authority. This case followed the line of cases that applied the *Ridgway* analysis to FEGLIA. *But see Herrera v. Metro. Life Ins. Co.*, 2011 WL 6415058 (S.D.N.Y.) (Congress did not intend "to occupy the field and thus to foreclose any state law role with respect to federal employee group life insurance.")

Widow's petition. Ex-Wife's Brief, 1-3, 10-20. Her main "distinction", is that the equitable remedy in this case arises out of a statute instead of common law. *Id.* at 10-11. Firstly and most importantly, it is entirely irrelevant whether or not an equitable remedy is based on a statutory right or common law.

Secondly, many, if not most of the equitable remedies in the FEGLIA Cases are grounded in statutory rights. In *Metro. Life Ins. Co. v. McShan*, the state equitable remedy arose under "California Civil Code section 2223 and 2224 which provide that one who detains or gains a thing by a wrongful act is an involuntary trustee of the thing gained." 577 F.Supp. 165, 166-167 (N.D. Cal. 1983). In *Metro. Life Ins. Co. v. Bell*, the state equitable remedy was grounded in California community property and intestate succession statutes. 924 F.Supp. 63, 64-65 (E.D. Tex. 1995). The state equitable remedy in *Metro. Life Ins. Co. v. Armstrong-Lofton*, was also based on California's community property laws which grant statutory property rights to a spouse. 19 F.Supp. 2d 1134, 1136 (C.D. Cal. 1998). Furthermore, a court's authority to divide up marital assets in a

divorce decree or similar order generally comes from a statute.[2]

Ex-Wife then tries to suggest that the legislative intent behind the equitable remedies in the FEGLIA Cases is somehow nobler than the legislative intent behind UNIF. PROBATE CODE § 2-804(h)(2).[3] *Id.* at 18-19. Accordingly, she argues, if this Court rules that FEGLIA preempts UNIF. PROBATE CODE § 2-804(h)(2), lower state courts will disregard this Court's opinion in cases that arise out of divorce decrees, property settlement agreements, etc. on the grounds that the intent behind those state equitable remedies is more important. *Id.*

Ex-Wife bases her argument on the theory that the intent behind the equitable remedies in the FEGLIA Cases is solely to prevent an insured from entering into an agreement with an ex-spouse and then using preemption to get around the insured's

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[2] For example, in Virginia, the Court's power to divide up marital property rights is derived from the Virginia code section titled "Court may decree as to property of the parties." VA. CODE ANN. § 20-107.3 (2011).

[3] VA. CODE ANN. § 20-111.1 (2011) is based on UNIF. PROBATE CODE § 2-804 (amended 2008). 12 states (i.e., 24% of the country) have already adopted UNIF. PROBATE CODE § 2-804, making this a nationwide issue. Therefore, statutory references herein will be to UNIF. PROBATE CODE § 2-804(b) (amended 2008) instead of VA. CODE ANN. § 20-111.1(A) (2011) and to UNIF. PROBATE CODE § 2-804(h)(2) (amended 2008) instead of VA. CODE ANN. § 20-111.1(D) (2011).

obligations under the agreement. *Id.* This, of course, ignores all the rights granted ex-spouses based on community property laws or divorce laws in which an ex-spouse is granted rights by the state instead of the insured. More importantly however, the intent behind UNIF. PROBATE CODE § 2-804(h)(2) is to protect an insured and his or her family from an ex-spouse. This intent is widely accepted as a legitimate and important interest for states to protect.[4] A lower court would be hard pressed to ignore this Court's ruling in this case because it feels the intent behind a divorce decree is more important than the intent behind UNIF. PROBATE CODE § 2-804(h)(2).

Despite her claims that the equitable remedy in this case is completely different than the equitable remedies in the FEGLIA Cases, she argues that the Virginia Supreme Court correctly ruled that this case was governed by the federal FEGLIA Cases. Ex-Wife's Brief, 12. So according to Ex-Wife, the Virginia Supreme Court properly followed the federal FEGLIA Cases, but, for purposes of reviewing the Virginia Supreme

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[4] Almost every state in the country has a statute that revokes dispositions of property in a will in favor of an ex-spouse upon a divorce. UNIF. PROBATE CODE § 2-804(b); MD. CODE ANN., EST. & TRUSTS § 4-105 (2012); CAL. PROB. CODE § 6122 (2012); TEX. PROB. CODE ANN. § 69 (2012); N.Y. EST. POWERS & TRUSTS LAW §5-1.4 (2012). 44 other states also have similar laws.

Court's opinion, this case is not governed by the FEGLIA Cases. Ex-Wife clearly wants to have her proverbial cake and eat it too.

Moreover, the courts which have ruled on UNIF. PROBATE CODE § 2-804(h)(2), the Virginia Supreme Court and the Circuit Court of Virginia for Fairfax County, are of the opinion that this case falls squarely within the split of authority among the FEGLIA Cases. *Maretta v. Hillman*, 722 S.E.2d 32, 37 (Va. 2012). ("We are aware, as Hillman argues on brief, that our decision today stands in contrast to a majority of state court decisions."); *Hillman v. Maretta*, 80 Va. Cir. 439, 2010 WL 7373701, 7 (Va.Cir.Ct.), *rev'd* 722 S.E.2d 32 (Va. 2012).

That all being said, there is a meaningful distinction between the equitable remedy in this case and those in the FEGLIA cases. However, this distinction makes this case an ideal candidate for review. The only distinction which matters between the FEGLIA Cases and this case is that the FEGLIA Cases all "dealt with a circumstance where a federal employee had a contractual obligation to maintain a FEGLIA beneficiary designation in favor of a former spouse or was under a court order to maintain that designation." Ex-Wife's Brief, 12. In other words, these cases all dealt with attempts by states to restrict an

insured's right to designate and/or change a beneficiary designation. This is quite different than the equitable remedy contained in UNIF. PROBATE CODE § 2-804(b), which does not at all restrict the insured's rights.

UNIF. PROBATE CODE § 2-804(b) is designed to protect the insured's interests from an ex-spouse. It does not force an insured to designate or maintain anyone as a beneficiary. It simply voids a then existing beneficiary designation of an ex-spouse at a moment in time (i.e., upon a divorce). At any time before or thereafter, the insured is free to designate anyone he or she chooses, including an ex-spouse. UNIF. PROBATE CODE § 2-804(b) merely creates a presumption that an insured would rather have his or her insurance proceeds go to the natural objects of his affection (i.e., his family), instead of an ex-spouse. As noted above, this is a well-grounded assumption which has been accepted at some level by almost every state in the country. Accordingly, UNIF. PROBATE CODE § 2-804(b) is not a restriction of an insured's right to freely "designate the beneficiary and to alter that choice at any time." *Kidd v. Pritzel*, 821 S.W.2d 566, 571-572 (Mo. Ct. App. 1991); *Barden v. Metro. Life Ins. Co.*, 41 N.C. App. 135, 138 (1979); *Roberts v. Roberts*, 560 S.W.2d 438, 440 (Tex. Civ. App. 1977).

The distinction between UNIF. PROBATE CODE § 2-804(b) and equitable remedies which restrict an insured's rights to designate a beneficiary, in no way takes this case out of the split of authority in the FEGLIA Cases. However, it does make this case a much better vehicle for resolving the preemption issue than a case that arises from a restriction of an insured's right, such as under a divorce decree.

Most likely, this Court will rule on FEGLIA preemption one of two ways – either it will apply the *Ridgway* analysis or it will apply the *Egelhoff* and *Kennedy* analyses. If this Court determines that the *Ridgway* analysis applies to FEGLI policies, this Court will rule that an insured has an absolute right to designate and/or change a FEGLI beneficiary designation, and state law cannot restrict that right. *Ridgway*, 454 U.S. at 55-57. If this Court applies the *Ridgway* analysis in a case where the equitable remedy clearly restricts an insured's right to designate or maintain a beneficiary designation, such as with a divorce decree, it will make it clear that such equitable remedies are preempted. However, the question as to whether UNIF. PROBATE CODE § 2-804(h)(2) amounts to such a restriction will still be left open for the 12 states (or 24% of the country) which have adopted it since, as previously discussed, UNIF. PROBATE CODE § 2-804(h)(2) does not restrict

an insured from designating or changing a beneficiary at any time. On the other hand, with this case, this Court could resolve the matter for the entire country by ruling that equitable remedies cannot restrict an insured's right to designate a beneficiary (which would resolve the matter for such divorce decree based cases), and then determining whether or not UNIF. PROBATE CODE § 2-804(h)(2) amounts to such a restriction.

Conversely, if this Court determines that the *Egelhoff* and *Kennedy* analyses apply to FEGLI policies instead of the *Ridgway* analysis, then this Court will clearly establish that FEGLI proceeds must be paid in accordance with FEGLIA's statutory order of precedence. *Egelhoff*, 532 U.S. at 149-150; *Kennedy*, 129 S. Ct. at 875-876. However, as *Kennedy* expressly noted in footnote 10, this Court would then need to determine if an action could be brought against the recipient of those proceeds after they have been paid. *Kennedy*, 129 S. Ct. at 875 n. 10.

Surely, Congress did not intend for ex-spouses of the vast number of federal employees in this country to have an absolute right to FEGLI proceeds when an insured neglected to change a beneficiary designation following a divorce. This contention is supported by a considerable and almost unanimous body of federal and state courts

which have held that post-payment claims are permitted in ERISA cases.[5] Nevertheless, this Court has clearly not ruled on this subject for FEGLIA or ERISA cases, and this case gives this Court an opportunity to do so. This will not only resolve the matter for all FEGLIA preemption cases, but it will, despite Ex-Wife's claim to the contrary, also give significant guidance to, if not control, lower courts dealing with ERISA cases.

II. TWENTY-FOUR PERCENT OF THE COUNTRY IS A SIGNIFICANT PORTION OF THE COUNTRY.

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[5] *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131, 136-139 (3rd Cir. 2012); *Central States Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 678-79 (6th Cir. 2000); *Sweebe v. Sweebe*, 712 N.W.2d 708, 710-11 (Mich. 2006); *Guildry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1082-83 (10th Cir. 1994); *Hoult v. Hoult*, 373 F.3d 47, 54-55 (1st Cir. 2004); *Wright v. Riveland*, 219 F.3d 905, 919-21 (9th Cir. 2000); *Kickham Hanley P.C. v. Kodak Ret. Income Plan*, 558 F.3d 204, 211 (2nd Cir. 2009); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54-56 (3rd Cir. 1994); *Alcorn v. Appleton*, 708 S.E.2d 390 (Ga. App. 2011); *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2004), *Estate of Sauers*, 971 A.2d 1265 (Pa. Super. 2009); *Reed Estate v. Reed*, 810 N.W.2d 284 (Mich. App. 2011); *Partlow v. Person*, 798 F.Supp.2d 878 (E.D. Mich. 2011); *Morris v. Met. Life Ins. Co.*, 751 F.Supp.2d 955 (E.D. Mich. 2010); *Hall v. Hall*, 2009 WL 2837720 (E.D.Pa.); *Brandenberg v. Watson*, 2011 WL 609796 (S.D. Ohio); *McCalip v. Met. Life Ins. Co.*, 2009 WL 1883533 (E.D. Mich.); *Brown v. Wright*, 2009 WL 2952682 (Mich. App. Unpub.); *but see Langevin v. McMorrow*, 79 Mass. App.Ct. 1126 (2011 Unpub.).

Ex-Wife also makes the incredibly farfetched argument that, in and of itself, preemption of UNIF. PROBATE CODE § 2-804(h)(2) does not raise a nationwide issue, but in fact raises a very limited and narrow issue since "only" 12 states have adopted UNIF. PROBATE CODE § 2-804(h)(2) so far. Ex-Wife's Brief, 20-23. She then dismisses the likelihood that any other states will adopt this code section since there are no current bills to do so. *Id.* at 20. This, of course, ignores that fact that Massachusetts adopted UNIF. PROBATE CODE § 2-804(h)(2) effective just last year. MASS. GEN. LAWS ch. 190B, § 2-804(h)(2) (2011). However, even assuming that no other state ever adopts UNIF. PROBATE CODE § 2-804(h)(2), the ridiculousness of the suggestion that 12 states or 24% of the country is insignificant, speaks for itself.

III. THIS COURT'S RULINGS IN ERISA CASES ARE HIGHLY PERSUASIVE ON FEGLIA CASES AND VICE VERSA.

Ex-Wife takes issue with Widow's assertion that this Court has recognized in footnote 10 of *Kennedy* that the question presented in this case raises an important unresolved issue. Ex-Wife's Brief, 24-25. Ex-Wife's argument is based on the fact that *Kennedy* dealt with a life insurance policy governed by ERISA while this case deals with a life insurance policy governed by FEGLIA. Ex-

Wife is clearly of the opinion that this Court's ruling on one Act would have no impact on the other. This is somewhat ironic given that Ex-Wife bases her preemption argument, not on a FEGLIA case, but on this Court's holding in *Ridgway*, a SGLIA case. Apparently, for Ex-Wife, it is entirely appropriate to rely on a different Act (i.e., SGLIA) for purposes of establishing that FEGLIA preempts UNIF. PROBATE CODE § 2-804(h)(2), but preposterous to suggest that ERISA cases have any bearing on the subject.

ERISA is "a statutory scheme more analogous to FEGLIA than either [National Service Life Insurance Act] or SGLIA." *Maretta*, 722 S.E.2d at 42 (McClanahan, J., dissenting). SGLIA, unlike FEGLIA, has an anti-attachment provision;[6] FEGLIA, unlike SGLIA, has a provision which permits divorce decrees to alter and restrict a beneficiary designation;[7] and Congress enacted FEGLIA and SGLIA for entirely different reasons.[8]

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[6] The relevance of the anti-attachment provision contained in SGLIA is discussed in Widow's Petition, 31-35 and does not need to be repeated here.

[7] The relevance of 5 U.S.C. § 8705(e) is discussed in Widow's Petition, 35-36 and does not need to be repeated here.

[8] The Congressional intent behind the enactment of FEGLIA, to offer life insurance to federal employees so that the federal government, in competing with private employers, was offering benefits in-line with (but not better than) the best practices of progressive private employers, is discussed in Widow's Petition, 29-30 and does not need to be repeated

The suggestion that ERISA cases have no bearing on FEGLIA cases and vice versa, again speaks for itself. Furthermore, while this Court clearly left open the issue of whether a suit may be brought against the beneficiary of insurance proceeds post-payment, at least with regard to policies governed by ERISA, whether this Court invited this issue to be brought before it is known by this Court and requires no further discussion.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. Alternatively, this Court should Call for the Views of the Solicitor General.

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here. The Congressional intent behind the enactment of SGLIA, to improve the morale of servicemen in the interests of national defense, is discussed in Widow's Petition, 28-29 and does not need to be repeated here.

Respectfully, submitted.

Daniel H. Ruttenberg
Counsel of Record
SmolenPlevy
8045 Leesburg Pike, Fifth Floor
Vienna, VA 22182
dhruttenberg@smolenplevy.com
703.790.1900

Counsel for Petitioner

May 29, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-1221

In the Supreme Court of the United States

JACQUELINE HILLMAN, PETITIONER

v.

JUDY A. MARETTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ELAINE KAPLAN
General Counsel
R. ALAN MILLER
Associate General Counsel
SUSAN G. WHITMAN
Deputy Assistant General Counsel
JAMES MUETZEL
Senior Attorney
Office of Personnel Management
Washington, D.C. 20415

Library of Congress
Law Library

QUESTION PRESENTED

The Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), 5 U.S.C. 8701 *et seq.*, and its implementing regulations, require that FEGLI benefits "shall be paid" to the beneficiary properly designated by the insured, 5 U.S.C. 8705(a), and specify that the "right" of the insured to designate that beneficiary at any time cannot be waived or restricted, 5 C.F.R. 870.802(f). It is undisputed that FEGLIA preempts state laws like Section 20-111.1(A) of the Virginia Code, which purport to revoke automatically an insured's designation of his spouse as the beneficiary of his life insurance upon the entry of a divorce decree terminating the insured's marriage.

Section 20-111.1(D) of the Virginia Code provides that, if Section 20-111.1(A)'s revocation-upon-divorce provision "is preempted by federal law" with respect to the payment of a death benefit and the insured's former spouse receives a death-benefit payment to which another person would have been entitled if Section 20-111.1(A) had "not [been] preempted," then the former spouse shall be "personally liable [to that other person] for the amount of the payment." The question presented is:

Whether FEGLIA and its implementing regulations preempt Section 20-111.1(D)'s authorization of a state-law cause of action against the insured's designated beneficiary to obtain the amount of life insurance benefits that FEGLIA required to be paid to the designated beneficiary.

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In the Supreme Court of the United States

No. 11-1221

JACQUELINE HILLMAN, PETITIONER

v.

JUDY A. MARETTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari.

STATEMENT

1. Congress enacted the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), ch. 752, 68 Stat. 736 (5 U.S.C. 8701 *et seq.*), to provide "a low-cost group life insurance program to Federal employees" to better enable those employees "to carry out their responsibilities to their families." H.R. Rep. No. 2579, 83d Cong., 2d Sess. 4-5 (1954); accord S. Rep. No. 1654, 83d Cong., 2d Sess. 2, 5 (1954). FEGLIA authorizes the Office of Personnel Management (OPM) to purchase one or more group life insurance policies to provide benefits under the Act. 5 U.S.C. 8709(a) (2006 & Supp. V 2011). OPM

has accordingly entered into a group-life-insurance contract (Group Policy No. 17000-G) with the Metropolitan Life Insurance Company (MetLife). See OPM, *Federal Employees' Group Life Insurance (FEGLI) Program Handbook* 1, 181 (2008) (*FEGLI Handbook*), http://www.opm.gov/insure/life/reference/handbook/feglihandbook.pdf. MetLife pays all FEGLI benefits "according to [that] contract," 5 C.F.R. 870.102, and administers FEGLI claims through one of the company's offices, known as the Office of Federal Employees' Group Life Insurance. 5 C.F.R. 870.101; *FEGLI Handbook* 1; see 5 U.S.C. 8709(b).

Congress has specified that, with one exception, FEGLI benefits "shall be paid" upon an insured employee's death to the employee's survivors under a statutory "order of precedence." 5 U.S.C. 8705(a); see 5 C.F.R. 870.801(a). If the employee has "designated" a "beneficiary * * * in a signed and witnessed writing received before death in the employing office" or OPM, the benefits "shall be paid" to that designated beneficiary. 5 U.S.C. 8705(a); see 5 C.F.R. 870.802(b). "[A] designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect." 5 U.S.C. 8705(a). If the employee fails properly to designate a surviving beneficiary, the insurance proceeds "shall be paid" to the employee's relatives or estate in the order specified in Section 8705(a). *Ibid.* After a designated beneficiary, a surviving widow or widower is next in the order of precedence. *Ibid.*

OPM's implementing regulations (5 U.S.C. 8716(a)) provide that an insured employee has the "right" to "change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary." 5

C.F.R. 870.802(f). "This right cannot be waived or restricted." *Ibid.*[1]

The insured's right of designation is subject to the previously noted statutory exception to FEGLIA's order of precedence. Under that exception, if the government timely receives a "court decree of divorce, annulment, or legal separation" or a "court order or court-approved property settlement agreement incident to [such a] decree" requiring the insured's FEGLI benefits to be paid to a specific person, the FEGLI benefits "shall be paid (in whole or in part)" to that person "to the extent expressly provided for in the terms of" the decree, order, or agreement. 5 U.S.C. 8705(e)(1). Such a court-ordered designation is effective, however, only if a certified copy of the decree, order, or agreement "is received, before the date of the covered employee's death, by the employing agency or, if the employee has separated from service, by [OPM]." 5 U.S.C. 8705(e)(2); see 5 C.F.R. 870.801(d). If so received, the decree, order, or agreement (unless modified) will prevent the insured employee from "designat[ing] a different beneficiary" without the consent of the person designated in the decree, order, or agreement. 5 C.F.R. 870.802(i)(1).

OPM informs insured individuals that a FEGLI "designation of beneficiary remains valid until" the insured "submit[s] a valid new designation" or assigns his ownership rights in an irrevocable "assignment of [the] insurance," or the insured's FEGLI coverage is cancelled or terminates. *FEGLI Handbook* 168-169; see 5 C.F.R. 870.802(g). OPM accordingly advises insureds that they

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[1] The insured, in certain circumstances, can assign his right of designation to another. See 5 U.S.C. 8706(f) (Supp. V 2011); 5 C.F.R. 870.901(a) and (i), 870.902; see also 5 C.F.R. 870.802(g)(2), 870.901(e), 870.909(a)(1).

must "ensure that [their] designation of beneficiary remains accurate and reflects [their] intentions," because FEGLI "[b]enefits will be paid based on a valid designation, regardless of whether that designation still reflects [the insured's] intentions." *FEGLI Handbook* 160. In particular, OPM informs insureds that "[a] divorce does not invalidate a designation that names [the insured's] former spouse as beneficiary" and that an employee who experiences a "significant change in [his] life, such as a * * * divorce," thus may "want to consider completing a new designation form." *Ibid.*

In 1980, Congress amended FEGLIA to include an express preemption provision. See 5 U.S.C. 8709(d). That provision states that "[t]he provisions of any contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions." 5 U.S.C. 8709(d)(1).

2. In 1996, Warren Hillman designated respondent—who was his wife at the time—as the beneficiary of his FEGLIA life insurance. Pet. App. 4a. In 1998, Warren and respondent divorced. *Ibid.* Neither the divorce decree nor the associated property settlement agreement required Warren to maintain respondent as his FEGLI beneficiary. Br. in Opp. (Opp.) 8. In 2002, Warren married petitioner. Pet. App. 4a. Despite his divorce and subsequent marriage, Warren never changed his 1996 FEGLI beneficiary designation. *Ibid.*

In 2008, Warren died. Petitioner (Warren's widow) and respondent (his ex-wife) filed claims for FEGLI

benefits. Consistent with the 1996 beneficiary designation, FEGLI benefits totaling $124,558 were paid to respondent. Pet. App. 4a.

3. In 2009, petitioner filed this civil action against respondent, alleging that, under Section 20-111.1(D) of the Virginia Code, respondent was liable to her in an amount equal to the amount that respondent received from Warren's FEGLIA life insurance. Pet. App. 4a.

a. Two subsections of Section 20-111.1 are presently relevant. First, Subsection A provides, in pertinent part, that, "[e]xcept as otherwise provided under federal law or [Virginia] law," the "entry of a decree of annulment or divorce" automatically "revoke[s]" "any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party." Va. Code Ann. § 20-111.1(A) (Supp. 2012). "A death benefit prevented from passing to a former spouse by [that provision] shall [instead] be paid as if the former spouse had predeceased the decedent." *Ibid.* The parties agree that FEGLIA preempts Subsection A. Pet. App. 8a. If, however, Subsection A had not been preempted, it would have revoked Warren's then-existing FEGLI beneficiary designation upon the entry of his divorce decree. That revocation would then have entitled petitioner as Warren's widow to obtain his life-insurance benefits under FEGLIA's order of precedence. See 5 U.S.C. 8705(a).

Second, Subsection D expressly addresses circumstances in which federal law preempts Subsection A. Subsection D provides that:

> If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of

> any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

Va. Code Ann. § 20-111.1(D) (Supp. 2012). Under that state-law provision, respondent would be "personally liable" to petitioner in the amount of the payment that she received as the designated beneficiary of Warren's life insurance.

b. The state trial court granted summary judgment in favor of petitioner. Pet. App. 35a-58a. The court held that FEGLIA does not preempt Section 20-111.1(D), which "imposes a constructive trust on death benefit proceeds when [Section 20-111.1(A)] is preempted." *Id.* at 36a. The court thus determined that respondent was liable to petitioner in the amount of $124,558—the amount of FEGLI benefits previously paid to respondent—plus interest. *Id.* at 33a.

4. a. The Virginia Supreme Court reversed and rendered judgment for respondent in a divided opinion. Pet. App. 1a-31a. The court concluded that FEGLIA and its implementing regulations preempt Section 20-111.1(D) because Subsection D's application to FEGLI benefits conflicts with federal law. *Id.* at 8a-14a.

The court explained that FEGLIA effectuates Congress's "inten[t] to grant an insured the right to name without restriction * * * the person who will receive the benefits from a FEGLI policy," such that those benefits "belong to the designated beneficiary to the exclusion of all others." Pet. App. 8a-9a. FEGLIA and its regulations, the court determined, demonstrate "Congress' intent that 'only [the insured] [has] the power to create and change a beneficiary interest [in FEGLI benefits],' that the right to do so cannot be waived or re-

stricted, and that the FEGLI benefits belong to the named beneficiary." *Id.* at 12a (quoting *Ridgway* v. *Ridgway*, 454 U.S. 46, 60 (1981)) (third brackets added). The court further explained that Section 20-111.1(D)'s establishment of a state cause of action against a named beneficiary to whom FEGLI benefits have been paid "'create[s] a beneficiary interest' in the policy proceeds" for someone other than the designated beneficiary. *Id.* at 13a (quoting *Ridgway*, 454 U.S. at 60). That state-created interest in the proceeds, the court concluded, "nullifies the [insured's] choice and frustrates the deliberate purpose of Congress." *Ibid.* (quoting *Wissner* v. *Wissner*, 338 U.S. 655, 659 (1950)). "Congress," the court explained, "did not intend merely for the named beneficiary in a FEGLI policy to receive the proceeds, only then to have them subject to recovery by a third party under state law." *Ibid.*

The court explained that it found this Court's decision in *Ridgway* "to be highly persuasive, if not binding." Pet. App. 9a. *Ridgway* concluded that a state-law constructive trust action for the proceeds from a serviceman's life insurance was preempted by "identical 'order of precedence' provisions" in the Servicemen's Group Life Insurance Act of 1965 (SGLIA), 38 U.S.C. 765 *et seq.* (1976), and implementing regulations similar to those under FEGLIA. Pet. App. 9a-12a (citation omitted). The court observed that its decision, while consistent with FEGLIA decisions by several federal courts of appeals, see *id.* at 9a, 14a, "st[ood] in contrast" to the "majority of state court decisions." *Id.* at 14a. The latter decisions have concluded that "FEGLIA does not preempt a state-law constructive trust on FEGLI proceeds for the benefit of someone other than the

named beneficiary." *Ibid.* (citing, *e.g.*, *McCord* v. *Spradling*, 830 So. 2d 1188 (Miss. 2002)).

b. Justice McClanahan dissented. Pet. App. 16a-31a. She opined that FEGLIA's "order of precedence" was enacted simply for "the purpose of providing 'administrative convenience' for [OPM] and the insurer in processing claims and distributing benefits" and that, once those benefits have been "paid out to the designated beneficiary," the federal interest in the FEGLI proceeds ends. *Id.* at 22a-23a (citation omitted). Because the liability established by Section 20-111.1(D) "impacts FEGLI benefits, if at all, only after the benefits have been paid to the designated beneficiary," *id.* at 26a, Justice McClanahan concluded that federal law did not preempt that provision, *id.* at 23a-24a (citing cases).

DISCUSSION

The Virginia Supreme Court correctly held that federal law preempts Virginia Code § 20-111.1(D)'s establishment of a state-law action against properly designated beneficiaries to whom the government's insurer has paid FEGLI benefits. The court's decision, however, deepens a pre-existing division of authority concerning whether FEGLIA and its implementing regulations preempt state-law actions for FEGLI proceeds after the distribution of those proceeds, in accordance with FEGLIA's requirements, to the designated beneficiary. This Court should grant certiorari to resolve that disagreement on an important legal issue governing the Nation's largest group-life-insurance program.

A. FEGLIA And Its Implementing Regulations Preempt State-Law Actions To Obtain FEGLI Proceeds From Properly Designated Beneficiaries To Whom Those Proceeds Have Been Paid

A state law is implicitly preempted to the extent that it conflicts with federal law. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."). Such conflict preemption occurs "where it is impossible for a private party to comply with both state and federal law" and where state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 372-373 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Under those principles, FEGLIA and its implementing regulations preempt state-law suits under Section 20-111.1(D) of the Virginia Code.

1. FEGLIA's statutory "order of precedence" directs that FEGLI benefits "shall be paid" first to any beneficiary properly designated by the insured, 5 U.S.C. 8705(a). OPM's implementing regulations recognize the insured's associated "right" to designate a beneficiary "at any time without the knowledge or consent of the previous beneficiary." 5 C.F.R. 870.802(f). Those provisions preempt Section 20-111.1(D)'s establishment of a state-law action for FEGLI proceeds after those proceeds have been distributed, per FEGLIA's requirements, to the insured's designated beneficiary. This Court has twice addressed materially similar provisions and held that they preempt such state-law actions.

First, in *Wissner* v. *Wissner*, 338 U.S. 655 (1950), the Court concluded that the National Service Life Insur-

ance Act of 1940 (NSLIA), 38 U.S.C. 801 *et seq.* (1946), preempted a state-law action by the insured's widow to recover a portion of the proceeds that had been paid to the insured's designated beneficiary (his mother). The "controlling section of the Act," the Court explained, provided that the insured "'shall have the right to designate the beneficiary or beneficiaries of the insurance'" and shall "'at all times have the right to change the beneficiary or beneficiaries.'" 338 U.S. at 658 (quoting 38 U.S.C. 802(g) (1946)). This Court considered that provision clear in its "direct[ion] that the proceeds [of the insurance] belong to the named beneficiary and no other." *Ibid.* The Court found it "plain" that ordering a portion of the proceeds to be transferred to the plaintiff-widow would improperly "substitute[]" her for "the mother, who was the beneficiary Congress directed shall receive the insurance money." *Id.* at 658-659. Such an order, the Court determined, would impermissibly "nullif[y] the [insured's] choice and frustrate[] the deliberate purpose of Congress," regardless whether the order was "directed at the very money received from the Government [by the designated beneficiary] or an equivalent amount." *Id.* at 659.

In *Ridgway* v. *Ridgway*, 454 U.S. 46, 47 (1981), the Court applied *Wissner* to hold that SGLIA, 38 U.S.C. 765 *et seq.* (1976) (now 38 U.S.C. 1965 *et seq.*), and its implementing regulations preempted a state-law "constructive trust imposed upon [life-insurance] policy proceeds" paid under that Act. The Court relied on SGLIA's statutory "order of precedence," which provided that the amount of insurance in force shall be paid first to "such 'beneficiary or beneficiaries as the [insured] . . . may have designated'" properly. 454 U.S. at 52 (quoting 38 U.S.C. 770(a) (1976) (now 38 U.S.C.

1970(a))). Through that provision, the Court held, "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.* at 56 (quoting *Wissner*, 338 U.S. at 658).

The Court recognized a "small difference[] between SGLIA and the predessor NGLIA" considered in *Wissner* in that SGLIA lacked NSLIA's statutory text permitting the insured to change his designated beneficiary "at all times" and "without the consent" of a prior beneficiary. *Ridgway*, 454 U.S. at 57. But the Court concluded that SGLIA's "unqualified directive to pay the proceeds to the properly designated beneficiary" per the statutory order of precedence "clearly suggests that no different result was intended by Congress." *Ibid.* And "any possible ambiguity" on that point, the Court determined, was "eliminated" by SGLIA's regulations, which expressly gave the insured the right to change beneficiaries "'at any time and without the knowledge or consent of the previous beneficiary.'" *Ibid.* (quoting 38 C.F.R. 9.16(e) (1980) (now 38 C.F.R. 9.4(b))). SGLIA and its regulations thus gave the insured "an absolute right to designate the policy beneficiary" and conferred the "power to create and change a beneficiary interest," and those provisions preempted a state-law action for a constructive trust on the proceeds paid to the designated beneficiary. *Id.* at 59-60.

2. *Ridgway* and *Wissner* compel the conclusion that FEGLIA and its implementing regulations preempt Section 20-111.1(D)'s establishment of a state-law action for the amount of FEGLI proceeds paid to the insured's designated beneficiary. Indeed, SGLIA's statutory order of precedence and regulatory right to change beneficiaries, found dispostive in *Ridgway*, are materially identical to their counterparts in FEGLIA. See 5 U.S.C.

8705(a); 5 C.F.R. 870.802(f). As in *Ridgway* and *Wissner*, Congress's direction that insurance proceeds "shall be paid" to the properly designated beneficiary means that those proceeds belong to that "beneficiary and no other." *Wissner*, 338 U.S. at 658; see *Ridgway*, 454 U.S. at 56 (quoting *Wissner*). Under those decisions, any state-law action by a competing claimant seeking FEGLI proceeds from the designated beneficiary conflicts with federal law and is preempted.

Ridgway and *Wissner* foreclose the rationale of the dissent below. The dissent believed that the federal interest embodied in FEGLIA is confined to "administrative convenience—the ability of the OPM and the insurer to simply pay the life insurance proceeds to the named beneficiary * * * and move on to the next claim." Pet. App. 23a (McClanahan, J., dissenting). That interest, the dissent reasoned, ceases upon initial payment of the benefits, "[r]egardless of what claims" may subsequently be "brought to recover the proceeds once they are paid out to the designated beneficiary." *Ibid.* (citation and emphasis omitted). As *Ridgway* and *Wissner* explain, however, the interest protected by the parallel provisions in SGLIA and NSLIA is not confined to mere administrative convenience. It encompasses the insured's "right" "freely to designate the beneficiary," such that "the proceeds belong to the named beneficiary and no other." *Ridgway*, 454 U.S. at 56 (quoting *Wissner*, 338 U.S. at 658).

Ridgway found preemption even though the question was whether a constructive trust could be imposed on insurance proceeds that had already been distributed. 454 U.S. at 47, 49-50, 60. *Wissner* found preemption even though the question was whether a judgment could be entered against the designated beneficiary for the

amount of benefits that had been (and would be) paid to her. 338 U.S. at 658. As the Court explained in *Wissner*, "[w]hether directed at the very money received from the Government [by the designated beneficiary] or an equivalent amount" in the form of a judgment against her, such a judgment would "nullif[y] the [insured's] choice and frustrate[] the deliberate purpose of Congress." *Id.* at 659. There is no basis to reach any different result with respect to FEGLIA. Rather, with FEGLIA, as with SGLIA and NSLIA "Congress did not intend merely for the named beneficiary * * * to receive the proceeds, only then to have them subject to recovery by a third party under state law." Pet. App. 13a.

Petitioner's attempts (Pet. 28-36) to distinguish *Ridgway* are unpersuasive. First, petitioner contends (Pet. 28-30) that *Ridgway* gave "great weight" to SGLIA's national-defense-related purpose of increasing servicemembers' morale. But *Ridgway* noted that purpose only in the context of confirming the constitutional "*authority* of Congress to control payment of the proceeds of SGLIA policies" as "within the congressional powers over national defense." 454 U.S. at 56-57 (citation omitted; emphasis added). Petitioner has not questioned Congress's constitutional authority to enact FEGLIA.

Second, petitioner argues (Pet. 31-35) that although FEGLIA and SGLIA have "identical" order-of-precedence provisions, Congress's failure to enact an anti-attachment provision in FEGLIA like the one in SGLIA reflects an intent "to make FEGLI proceeds vulnerable to state domestic relations causes of action after the proceeds have been distributed." That is incorrect. SGLIA's anti-attachment provision broadly protects the statute's life-insurance proceeds by prohib-

iting "any 'attachment, levy, or seizure by or under any legal or equitable process whatever.'" *Id.* at 61 (quoting 38 U.S.C. 770(g) (1976) (now 38 U.S.C. 1970(g))). The absence of a similar provision in FEGLIA could speak, at most, to the extent to which FEGLI proceeds may be used generally to satisfy the unrelated obligations of the designated beneficiary. But it cannot fairly be read to evince an intent to permit claimants who seek FEGLI proceeds as would-be beneficiaries to displace Congress's deliberate choice in directing that those proceeds belong to the properly designated beneficiary.

Finally, petitioner argues (Pet. 35-36) that 5 U.S.C. 8705(e) distinguishes this case from *Ridgway*. Section 8705(e), however, merely allows certain court orders or court-approved agreements in divorce proceedings to displace a designated FEGLI beneficiary if the order or agreement expressly provides for a different beneficiary and is properly filed under FEGLIA before the insured's death. Far from suggesting that the designated beneficiary can be displaced in any other manner under state law, the provision specifies the precise (and sole) conditions in which the benefits may be paid to someone other than the designated beneficiary.

B. The Petition Presents An Important Question On Which Courts Of Appeals And State Supreme Courts Are In Conflict

Although the Virginia Supreme Court correctly held that federal law preempts Section 20-111.1(D) in this case, certiorari is warranted to decide whether FEGLIA and its implementing regulations preempt state-law causes of action for FEGLI proceeds once those proceeds have been distributed to the designated beneficiary. That important and recurring question has divid-

ed the courts of appeals and state supreme courts and warrants this Court's review.

1. Like the Virginia Supreme Court, several federal courts of appeals and one state court of last resort have held that FEGLIA and its implementing regulations preempt actions under state law that would divert FEGLI proceeds from the insured's designated beneficiary.

In *O'Neal* v. *Gonzalez*, 839 F.2d 1437 (11th Cir. 1988), the plaintiff, who claimed an entitlement to FEGLI proceeds even though the insured had properly designated another as the beneficiary, brought a state-law action against the designated beneficiary seeking a "constructive trust" that would have been imposed on the "proceeds of the FEGLIA policy once payment [was] made to the designated beneficiary." *Id.* at 1438-1439. The Eleventh Circuit held that FEGLIA and its implementing regulations preempted that action. *Id.* at 1439-1440. The court concluded that FEGLIA's statutory and regulatory provisions, which were adopted in part "for the benefit of designated beneficiaries," establish an "inflexible rule that the beneficiary designated in accordance with the statute would receive the policy proceeds" and thus confer a "substantive right of payment upon the designated beneficiary." *Ibid.* The "federal provisions regarding designation of beneficiaries," the court explained, give the insured "more than the right to do a meaningless act": They create a right to designate who is entitled to FEGLI proceeds. *Id.* at 1440 (citation omitted). A state-law action for a "constructive trust" on those proceeds, the court reasoned, would conflict with FEGLIA, because, "[i]f the proceeds [were permitted] to go to someone other than the designated beneficiary," the federal provisions governing the insured's

beneficiary designation would "serve[] no purpose." *Ibid.* (citation omitted).

The Alabama Supreme Court has also held that FEGLIA preempts a state-law constructive trust directing FEGLI proceeds to someone other than the designated beneficiary. *Metropolitan Life Ins. Co.* v. *Potter*, 533 So. 2d 589 (Ala. 1988). The First and Seventh Circuits are in accord. See *Metropolitan Life Ins. Co.* v. *Zaldivar*, 413 F.3d 119 (1st Cir. 2005); *Metropolitan Life Ins. Co.* v. *Christ*, 979 F.2d 575 (7th Cir. 1992).

In *Zaldivar*, the insured designated his second wife as his FEGLI beneficiary, notwithstanding an earlier divorce decree directing him to maintain his children from his first marriage as the beneficiaries. After the insured's death, MetLife was permitted to distribute the FEGLI proceeds to the second wife as the designated beneficiary. *Metropolitan Life Ins. Co.* v. *Zaldivar*, 337 F. Supp. 2d 343, 344-345 (D. Mass. 2004), aff'd, 413 F.3d 119 (1st Cir. 2005). Thereafter, the children advanced a claim for a "constructive trust" over the distributed proceeds on a state-law "unjust[] enrich[ment]" theory, *id.* at 346, but the First Circuit held that claim preempted. 413 F.3d at 120. Like *O'Neal*, *Zaldivar* reasoned that FEGLIA's order of precedence "direct[s] that the proceeds belong to the named beneficiary and no other," such that "alter[ing] the designation of a beneficiary * * * by imposing a constructive trust" would conflict with the statute. *Id.* at 121 (citations omitted); see *ibid.* (explaining that 5 U.S.C. 8705(e)'s provisions, which permit a divorce decree to displace FEGLIA's order of precedence in certain circumstances, were not followed).

The Seventh Circuit in *Christ* similarly held that FEGLIA preempts a state-law claim to impose a "constructive trust" on FEGLI proceeds under an "unjust[]

enrich[ment]" theory. 979 F.2d at 576. *Christ*, like *O'Neal*, concluded that FEGLIA establishes an "inflexible rule" that FEGLI proceeds must be paid to the "beneficiary designated in accordance with the statute" based on FEGLIA's provisions requiring proceeds to be paid according to the statute's order of precedence and specifying that beneficiary designations have "no force or effect" unless executed and filed under FEGLIA. *Id.* at 578-579 (quoting *O'Neal*, 839 F.2d at 1440). *Christ* accordingly held that the "imposition of a constructive trust," which would "require[] that [the] proceeds be paid to someone [else]," "inevitably conflict[s] with this mandatory federal scheme." *Id.* at 579.[2]

Several state courts have issued decisions in conflict with the aforementioned decisions. See Pet. 10-17. Of particular salience, the Supreme Courts of Indiana and Mississippi have held that FEGLIA does not preempt state-law actions that divert FEGLI proceeds to someone other the designated beneficiary after those proceeds have been paid to that beneficiary. See *Hardy* v. *Hardy*, 963 N.E.2d 470 (Ind. 2012); *McCord* v. *Spradling*, 830 So. 2d 1188 (Miss. 2002).

Hardy rejected the argument that imposing a constructive trust on FEGLI proceeds would conflict with FEGLIA's statutory and regulatory provisions governing the "order of precedence and designation of beneficiaries." 963 N.E.2d at 477. In the court's view, the

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[2] *Christ* also stated that its implied-preemption holding was "reinforce[d]" by the preemptive effect that 5 U.S.C. 8709(d)(1) expressly gives to the provisions of the FEGLI contract. 979 F.2d at 579. That policy "expressly incorporates FEGLIA's order of precedence" and, the court explained, a state-law constructive trust remedy is "inconsistent with the order of precedence incorporated in the policy." *Ibid.* (citing Section 11 of FEGLI policy at "App. 113-14").

"sole purpose" of those provisions is to reduce "administrative and legal hassles" in processing FEGLI claims by clearly designating "to whom the proceeds are directly paid" in the first instance. *Id.* at 477-478 (citation omitted). "[O]nce proceeds are paid out to a designated beneficiary," the court reasoned, "state law claims asserting an equitable interest in those proceeds" brought against the designated beneficiary "do not conflict" with FEGLIA: Such post-distribution claims burden "[n]either the insurance carrier nor the government" because the obligation of "pay[ing] the policy proceeds quickly and directly to the named beneficiary" is discharged once the initial distribution is made. *Ibid.* (citation omitted).

McCord similarly holds that, while "the insurer is directed to pay any benefits" to the "named beneficiary" by federal law, FEGLIA does not preempt "equitable claims to the funds [that have been] paid" to the designated beneficiary. 830 So. 2d at 1203; see *id.* at 1193-1203 (discussing decisions that the court found persuasive). The "distinction between beneficiary status" governed by FEGLIA and "ultimate equitable entitlement" to the proceeds after their initial distribution, the court determined, "obviates any issue of federal preemption" in state-law actions involving claims to obtain FEGLI proceeds from the designated beneficiary herself. *Id.* at 1203.

2. Respondent contends (Opp. 18-20) that review is unwarranted because, unlike decisions involving state-law constructive trust actions, this case concerns a state statute that generally permits suit against individuals who receive an ex-spouse's FEGLI benefits based on a beneficiary designation submitted before their divorce. In respondent's view (Opp. 19-20), constructive trust ac-

tions could be distinguished from this case because they are based (as a matter of state law) on allegedly wrongful conduct by the insured that gives rise to an equitable claim to FEGLI proceeds by non-designated individuals. That asserted state-law distinction concerning the reasons for a state-law action to obtain FEGLI proceeds does not counsel against review.

Respondent recognizes that cases like *Hardy* and *McCord* are "based upon an incorrect view of *federal law*." Opp. 19 (emphasis added). Those decisions, unlike the decisions of the Virginia Supreme Court and several federal courts of appeals, hold that FEGLIA and its implementing regulations only identify the persons to whom FEGLI benefits should be paid *in the first instance* in order to simplify and streamline the processing of FEGLI claims by the government and its insurer. See pp. 17-18, *supra*. If this Court were to agree with the Virginia Supreme Court that federal law confers upon insureds a right to direct the payment of FEGLI benefits such that the proceeds belong to the designated beneficiary—a right that could not be displaced by state law reflecting a different judgment about the ultimate allocation of life-insurance proceeds —this Court's decision would eliminate the predicate for decisions like *Hardy* and *McCord* holding that FEGLIA does not preempt constructive-trust actions. Likewise, if this Court were to disagree with the Virginia Supreme Court by accepting petitioner's interpretation of FEGLIA, even respondent appears to acknowledge (Opp. 20 n.8) that the Court's decision should resolve the conflict of authority. In other words, differences in state-law justifications for permitting suit against designated beneficiaries after the FEGLI proceeds have been distributed do not control the application of con-

flict-preemption principles, which instead turns on the proper interpretation of FEGLIA and its regulations.[3]

Moreover, the lower courts' disagreement has important practical significance. The FEGLI Program "is the largest group life insurance program in the world, covering over 4 million Federal employees and retirees, as well as many of their family members." OPM, *Federal Employees' Group Life Insurance*, http://www.opm.gov/insure/life/. Under the program, over $2.4 billion in benefits were distributed annually in FY2007 and FY2008. OPM, Office of the Inspector General, *Final Audit Report No. 2A-II-00-09-065*, at 2 (2010), http://www.opm.gov/oig/html/AuditReports.asp. A uniform national rule is essential to ensure that the benefits from this federal program can provide a low-cost and reliable means for federal workers to "carry out their responsibilities to their families," H.R. Rep. No. 2579, 83d Cong., 2d Sess. 5 (1954). Allowing post-distribution state-law actions against properly designated beneficiaries would impose significant litigation costs and delay upon the very persons intended to benefit from the program and would undermine OPM's longstanding advice to insureds that their designation of beneficiaries will control the distribution of FEGLI benefits. Cf. *Christ*, 979 F.2d at 578 (noting government's position).

3. Although the Virginia Supreme Court's holding rests on implied-conflict-preemption principles as set

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[3] The trial court's understanding that this case involves a "constructive trust" further confirms that this action is not meaningfully distinguished from state-law actions involving constructive trusts. See Pet. App. 36a-37a (Section 20-111.1(D) "imposes a constructive trust on [FEGLIA's] death benefit proceeds" by "making [respondent] personally liable to [petitioner] for the full amount of the benefit").

forth above, the court also observed in a footnote that FEGLIA's express preemption provision, 5 U.S.C. 8709(d)(1), made "Congress's preemptive intent * * * more apparent." Pet. App. 13a n.3. The court did not, however, purport to assess whether FEGLIA's express preemption provision would independently preempt Section 20-111.1(D). The parties addressed express preemption in their briefs before the Virginia Supreme Court. See, *e.g.*, Resp. Va. Br. 8-15, 19; Pet. Va. Br. 7-20, 44-47; Va. Reply Br. 3-8, 10-13. But because the Virginia Supreme Court did not address the issue, this case would not afford a highly suitable vehicle to examine—in the first instance—whether Section 20-111.1(D) is expressly preempted. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (This Court "is a court of final review and not first view.") (citation omitted).

Additionally, the express-preemption provision grants preemptive force to the provisions of the contract between OPM and MetLife: "The provisions of any contract under [FEGLIA] which relate to the nature or extent of * * * benefits (including payments with respect to benefits) shall supersede and preempt any law of any State * * * which relates to group life insurance to the extent that the law * * * is inconsistent with the contractual provisions." 5 U.S.C. 8709(d)(1). This Court's ability to review the applicability of express preemption in this case would be complicated by the fact that the contract has not been made part of the record. Cf. *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 595 (2009) ("respondent may * * * 'rely upon any mat-

ter appearing in the record in support of the judgment'") (citation omitted).[4]

While this Court could await a case presenting a more suitable vehicle for addressing express preemption in addition to implied conflict preemption, that consideration does not counsel against granting certiorari. The existence of an express-preemption provision does not affect the operation of conflict-preemption principles, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001), and the Court accordingly has found preemption on such principles in lieu of addressing express preemption, *Boggs* v. *Boggs*, 520 U.S. 833, 841 (1997). That course is particularly appropriate here given that *Ridgway* and *Wissner* rested on conflict preemption in parallel statutory contexts and thus establish an appropriate and readily available framework for approaching this case. The lower courts have largely avoided any meaningful analysis of express preemption and have instead assessed whether FEGLIA preempts state-law actions against designated beneficiaries by reference to conflict-preemption principles, and the resulting division of authority concerns the application of those principles.

In addition, even if express preemption would resolve this particular case, its operation here would not necessarily address the broader disagreement among the lower courts. Section 8709(d) preempts "any law of any State * * * or any regulation issued thereunder" that "relates to group life insurance" and is "inconsistent with the contractual provisions." 5 U.S.C. 8709(d)(1).

---

[4] Contemporaneously with the filing of this brief, the government is separately seeking to lodge the contract with the Court. If the Court grants certiorari and desires merits briefing on express preemption, it may wish to consider directing the parties to address that issue.

While Section 20-111.1(D), as a state statute, is a "law of [a] State" subject to express preemption, there would be a further question whether common-law actions—at issue in other conflicting lower-court cases, see pp. 17-18, *supra*—likewise involve a "law of [a] State." Compare *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002), with *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 522-523 (1992) (plurality opinion); *id.* at 549 (Scalia, J., concurring in the judgment in part and dissenting in part). Conflict-preemption principles, by contrast, would presumably encompass the cases making up the disagreement. See pp. 15-18, *supra*. Finally, the sole court of appeals decision to find express preemption did so in a manner that largely reiterated and mirrored that court's application of conflict-preemption principles to reach the same conclusion. See *Christ*, 979 F.2d at 579; note 2, *supra*.[5] For these reasons, in the view of the government, the Court should grant certiorari and resolve the disagreement on the application of conflict-preemption principles to FEGLIA in the circumstances of this case.

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[5] The FEGLI contract was contained in the record in *Christ*. J.A. at 109-220, *Christ*, *supra* (No. 91-2515). *Christ* relied on provisions in the contract (which remain materially unchanged) that mirror the "order of precedence" in FEGLIA. 979 F.2d at 579. Although *Potter* also discussed express preemption, it does not appear to have relied on express preemption as an independent basis for finding preemption. See 533 So. 2d at 593-594 (FEGLIA's express-preemption provision reinforces the conclusion that "*Ridgway* is dispositive.")

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys

ELAINE KAPLAN
General Counsel
R. ALAN MILLER
Associate General Counsel
SUSAN G. WHITMAN
Deputy Assistant General Counsel
JAMES MUETZEL
Senior Attorney
Office of Personnel Management

DECEMBER 2012

JOINT APPENDIX

Supreme Court, U.S.
FILED
FEB 22 2013
OFFICE OF THE CLERK

No. 11-1221

In the Supreme Court of the United States

JACQUELINE HILLMAN,

Petitioner,

v.

JUDY A. MARETTA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

JOINT APPENDIX

DANIEL H. RUTTENBERG
Counsel of Record
SMOLENPLEVY
8045 Leesburg Pike
Fifth Floor
Vienna, VA 22182
dhruttenberg@
smolenplevy.com
(703) 790-1900

Counsel for Petitioner

GEORGE O. PETERSON
Counsel of Record
PETERSON SAYLOR, PLC
10555 Main Street
Suite 320
Fairfax, VA 22030
gpeterson@
petersonsaylor.com
(703) 225-3620

Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 11, 2012
CERTIORARI GRANTED JANUARY 11, 2013

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

I. CIRCUIT COURT OF FAIRFAX COUNTY CIVIL DOCKET FOR CASE #: CL-2009-0015137

Date	Judge/Party	Docket Text
10-19-2009	No Judge	Complaint Filed
01-21-2010	Defendant	Demurrer to Complaint
01-21-2010	Defendant	Plea in Bar to Complaint
03-05-2010	Defendant	Memorandum in Support of Demurrer and Plea in Bar
03-19-2010	Plaintiff	Memorandum in Opposition to Defendant's Demurrer
03-19-2010	Plaintiff	Plea in Bar
03-29-2010	Defendant	Defendant's Reply to Opposition to Demurrer and Plea In Bar
05-07-2010	Devine, Michael F.	Hearing result for Motion - 2 wk Civil Action held on 05/07/2010

		10:00 AM: Under Advisement CCJ/LMA-PIB/Demurrer & Summary Judgment 02-Schorr- Memo in Support of Demurrer & PIB
06-23-2010	Devine, Michael F.	Opinion Letter
06-25-2010	Devine, Michael F.	Amended Opinion Letter of 6/23/10
06-25-2010	Devine, Michael F.	LOOSE ORDER Opinion Letter be amended to correctly state that Daniel H. Ruttenberg is counsel for Ms. Hillman and that George O. Peterson is counsel for Ms. Maretta.
07-02-2010	Defendant	Defendant Judy A. Maretta's Answer and Grounds of Defense
07-16-2010	Plaintiff	Plaintiff's Motion for Summary Judgment and Memorandum of Points and Authorities
07-23-2010	Defendant	Response to Motion on 07/30/10.

07-23-2010	Defendant	Objection to Pltf's Motion for Summary Judgment.
07-30-2010	Devine, Michael F.	Hearing result for Motion - 2 wk Civil Action held on 07/30/2010 10:00 AM: Hearing Held - Final Order Entered 01-Ruttenberg-Mt for Summary Judgment
07-30-2010	Devine, Michael F.	Final Disposition Trial No Jury Plaintiff Motion for Summary Judgment is Granted. Judgment Granted to Plaintiff, Jacqueline Hillman.
08-06-2010	Defendant	Notice of Appeal to Supreme Court 7/30/10 MFD
10-08-2010	No Judge	File Sent to Supreme Court
03-04-2011	No Judge	Mandate from the Supreme Court 03/03/11. Upon the petition of Judy A. Maretta, an appeal is awarded her from a judgment rendered by Circuit Court of Fairfax

		County; upon the appellant, or someone for her, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the trial court in the penalty of $500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.
03.17.2011	No Judge	Cash Bond Posted (Receipt 344427 Dated 3/17/2011 for 500.00)

II. SUPREME COURT OF VIRGINIA
SCV RECORD #: 102042

Date	Docket Text
10-12-2010	Petition Received
10-28-2010	Petition Entered
11-15-2010	Brief in Opposition Received
03-03-2011	Petition Disposition G-Granted
04-11-2011	Opening Brief Received
04-11-2011	Appendix Received

05-05-2011	Appellee Brief Received
05-18-2011	Reply Brief Received
01-13-2012	Legacy Session Order/Opinion (Opinion); Disposition RF – Reversed and Final Judgment (Published)

[Filed: October 19, 2009]

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JACQUELINE HILLMAN
2601 16th Street North
Arlington, Virginia 22201,

Plaintiff,

v. CL 2009-15137

JUDY A. MARETTA
575 Alderman Road,
PO Box 400884
Charlottesville, Virginia 22904-4884

Defendant.

SERVE: Judy A. Maretta
575 Alderman Road, PO Box 400884
Charlottesville, Virginia 22904-4884

COMPLAINT FOR RECOVERY OF DEATH BENEFIT FROM FEDERAL EMPLOYEES' GROUP LIFE INSURANCE POLICY

COMES NOW your Plaintiff, *JACQUELINE HILLMAN*, by and through her counsel, Daniel H. Ruttenberg, Esquire, and SmolenPlevy, and hereby files this, her Complaint for Recovery of Death Benefit From Federal Employees' Group Life Insurance Policy against Defendant, *JUDY A MARETTA*. In support thereof, Plaintiff respectfully states as follows:

PARTIES

1. Plaintiff is a resident and domiciliary of the Commonwealth of Virginia and has been same for all periods relevant to the cause herein. She is the widow of Warren Hillman (hereinafter Decedent), upon whose death, benefits became payable under his Federal Employees' Group Life Insurance (FEGLI) policy.

2. Defendant is a resident of the Commonwealth of Virginia. She is the former spouse of Decedent; the marriage between Defendant and Decedent was terminated by Order of this Court on December 29, 1998.

JURISDICTION

3. Paragraphs 1 and 2 are referenced and incorporated as though fully set forth herein and made a part hereof.

4. This Court has jurisdiction over the subject matter of this cause.

5. This Court has personal jurisdiction over both parties to this action subject to §8.01-328.1.

FACTS AND BACKGROUND

6. Paragraphs 1 through 5 are referenced and incorporated as though fully set forth herein and made a part hereof.

7. This cause arises upon the distribution of Decedent's FEGLI benefits upon his death to Defendant, rather than Plaintiff.

8. Prior to his death, Decedent accumulated certain FEGLI benefits.

9. On December 2, 1996, Decedent designated Defendant, his then wife, as the beneficiary of his FEGLI policy.

10. On December 29, 1998, Defendant and Decedent were divorced by virtue of a Final Decree of Divorce entered by the Fairfax County Circuit Court.

11. No Orders, Decrees of annulment or divorce from the bond of matrimony, nor any written agreement between Defendant and Decedent conveys, grants or otherwise entitles Defendant to receive Decedent's FEGLI benefits.

12. Decedent's FEGLI policy was not owned by a trust and did not designate a trust as the beneficiary.

13. On October 11, 2002, Plaintiff and Decedent were married.

14. Subsequent to his divorce and during the course of his marriage to Plaintiff, Decedent did not reaffirm or designate anew Defendant as beneficiary of his FEGLI policy.

15. Subsequent to his divorce and during the course of his marriage to Plaintiff, Decedent did not change the beneficiary designation of his FEGLI policy to name Plaintiff as the beneficiary.

16. On July 28, 2008, Decedent died unexpectedly while married to Plaintiff.

17. After her husband's death, Plaintiff filed a claim for the death benefit from Decedent's FEGLI policy.

18. In September of 2008, Plaintiff was notified by the Office of Personnel Management that Decedent's insurance proceeds would be paid in accordance with his December 2, 1996 beneficiary designation.

19. In October of 2008, Defendant filed a claim for the death benefit from Decedent's FEGLI policy and received, not for value, the proceeds therefrom.

20. The Office of FEGLI refused to disclose the amount of funds paid to Defendant under Decedent's policy, but upon information and belief, the payment to Defendant was approximately $97,000.

21. Upon learning that Defendant received said death benefit, Plaintiff spoke with Defendant and was told that Defendant would not transfer any of said proceeds to Plaintiff.

LAW

22. Paragraphs 1 through 21 are referenced and incorporated as fully set forth herein and made a part hereof.

23. Pursuant to § 20-111.1(A) of the 1950 Code of Virginia, as amended, "[u]pon the

entry of a decree of annulment or divorce from the bond of matrimony on or after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent."

24. Pursuant to § 20-111.1(B) of the 1950 Code of Virginia, as amended, "[t]he term 'death benefit' includes any payments under a life insurance contract . . ."

25. Pursuant to 5 U.S.C. § 8705(a), the proceeds from an employee's FEGLI policy "shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of preference: First, to the beneficiary or beneficiaries designated by the employee . . . Second, if there is no designated beneficiary, to the widow or widower of the employee."

26. 5 U.S.C. § 8705 preempts § 20-111.1(D) of the 1950 Code of Virginia, as amended. U.S. Const. art. VI; *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

27. Pursuant to § 20-111.1(D) of the 1950 Code of Virginia, as amended, if federal law preempts § 20-111.1(A) of the 1950 Code of Virginia, as amended, "with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted."

28. Pursuant to 5 U.S.C. § 8705(a), if the designated beneficiary of a FEGLI policy has predeceased the insured, the widow of the insured is entitled to the proceeds of such FEGLI policy.

COMPLAINT

29. Paragraphs 1 through 28 are referenced and incorporated as fully set forth herein and made a part hereof. Defendant filed

for the death benefit from Decedent's FEGLI policy.

30. Defendant received the death benefit from Decedent's FEGLI policy.

31. § 20-111.1(A) of the 1950 Code of Virginia, as amended, provides that Plaintiff, the widow of Decedent, instead of Defendant, the former spouse of Decedent, is entitled to said proceeds.

32. § 20-111.1(A) of the 1950 Code of Virginia, as amended, is preempted by federal law which enabled Defendant to receive said proceeds.

33. Pursuant to § 20-111.1(D) of the 1950 Code of Virginia, as amended, Defendant is personally liable to Plaintiff for all monies she received as a death benefit from Decedent's FEGLI policy.

34. Had Defendant been deemed to have predeceased Decedent in accordance with § 20-111.1(A) of the 1950 Code of Virginia, as amended, Plaintiff would have been entitled to receive the proceeds from his FEGLI policy.

35. Plaintiff has suffered damages as a direct and proximate result of Defendant's actions.

36. Plaintiff has suffered damages in the amount of funds received by Defendant from the payout of Decedent's FEGLI policy, which upon information and belief was approximately $97,000.

37. After learning that the FEGLI proceeds had been paid to Defendant, Plaintiff contacted Defendant regarding her receipt of these monies.

38. Plaintiff requested that the monies be forwarded to her for the reasons set forth herein.

39. Defendant refused to forward to Plaintiff any of the monies received by her from Decedent's FEGLI policy.

40. Plaintiff has been deprived of the use and benefit of these monies since Defendant's receipt of same.

41. Defendant has been unjustly enriched by the use and benefit of monies received by her from Decedent's FELGI policy.

42. Defendant has acted in bad faith in retaining the proceeds of Decedent's FELGI policy.

43. Defendant knew or should have known that she had no right to receive the proceeds of her ex-husband's FELGI policy.

44. Defendant knew or should have known that the rightful recipient of Decedent's FELGI policy proceeds is Plaintiff, Decedent's widow.

45. Defendant should have forwarded the proceeds of Decedent's FELGI policy proceeds to Plaintiff, Decedent's widow.

46. To date, Defendant continues to willfully retain possession of the FELGI policy proceeds.

47. Defendant unlawfully retains possession of the FELGI policy proceeds.

48. Plaintiff has incurred attorneys' fees and costs in pursuing the instant action.

WHEREFORE, your Plaintiff, *JACQUELINE HILLMAN*, respectfully prays that:

A. Defendant be made a party to this action.

B. Defendant be ordered to pay to Plaintiff pursuant to § 20-111.1 of the 1950 Code of Virginia, as amended, any and all funds Defendant received from Decedent's FEGLI policy, or in the alternative, that Plaintiff be awarded a judgment against Defendant for the sum received by Defendant as proceeds of Decedent's FEGLI policy which, upon information and belief is $97,000, with interest from the date Defendant received these monies, to-wit, October 2008.

C. Plaintiff be awarded her attorneys' fees and Court costs incurred in pursuing this matter.

D. Plaintiff be granted such other and further relief as the nature of this cause requires and as this Court may deem appropriate.

JACQUELINE HILLMAN

By Counsel

SMOLENPLEVY

/s/_____

Daniel H. Ruttenberg, Esquire
Counsel for Plaintiff
VSB # 41863
8045 Leesburg Pike, Suite 540
Vienna, VA 22182
703-790-1900
703-790-1754 (facsimile)

[Filed January 21, 2010]

V I R G I N I A:

IN THE FAIRFAX COUNTY CIRCUIT COURT

JACQUELINE HILLMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action**
	)	**No.: 2009-15137**
	)	
JUDY A. MARETTA,	)	
	)	
Defendant.	)	
	)	

DEMURRER AND PLEA IN BAR

Pursuant to §8.01-273(A) of the Virginia Code, Defendant Judy A. Maretta (hereinafter "Ms. Maretta"), files this Demurrer and Plea in Bar to Plaintiff's Complaint for Recovery of Death Benefit from Federal Employees' Group Life Insurance Policy ("Complaint"), and states the following:

1. Defendant is the designated beneficiary of Warren Hillman's ("Decedent")

Federal Employees' Group Life Insurance ("FEGLI") policy. Complaint at ¶ 9.

2. Despite Decedent's 1998 divorce from Ms. Maretta and subsequent marriage to Plaintiff, "Decedent did not change the beneficiary designation of his FEGLI policy to name Plaintiff as the beneficiary." Complaint at ¶ 15.

3. Section § 8705 of the Federal Employees' Group Life Insurance Act ("FEGLIA", known as the statutory "order of precedence," provides that:

> [e]xcept as provided in subsection (e), the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:
>
> *First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office . . . .*

> Second, *if there is no designated beneficiary*, to the widow or widower of the employee.

5 U.S.C. § 8705(a) (2009) (emphasis added). Section 8709(d)(1) of FEGLIA provides for the preemption of state laws regulating group life insurance to the extent they are inconsistent with FEGLIA:

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

5 U.S.C. § 8709(d)(1).

4. As Ms. Maretta is the designated beneficiary under Decedent's FEGLI policy, Ms. Maretta is entitled to the proceeds of the policy Section 8705(a). See 5 U.S.C. § 8705(a).

5. Virginia Code § 20-111.1(A) provides that

> [u]pon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent.

Virginia Code § 20-111.1(A) (2009).

6. As Plaintiff correctly concedes, FEGLIA preempts Section 20-111.1(A). See Complaint ¶ 32; see also Egelhoff v. Egelhoff, 532 U.S. 141, 150 (2001) (holding that the Employee Retirement Income Security Act of 1974, an analogous statutory scheme to FEGLIA, preempted a Washington statute that is very similar to Section 20-111.1(A)).

7. Plaintiff, therefore, states a cause of action under Section 20-111.1(D), which provides:

> [i]f this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

See Complaint ¶ 33; Virginia Code § 20-111.1(D).

8. As Section 20-111.1(D) conflicts with Section 8705(a), by providing for the distribution of the value of the proceeds of the FEGLI policy to someone other than the designated beneficiary, Section 8705(a) and 8709(d)(1) of FEGLIA preempt Section 20-111.1(D), as Plaintiff correctly, though perhaps inadvertently, acknowledges.[1] See Complaint at ¶ 26; Dugan v. Childers, 261 Va. 3, 9-11, 539 S.E.2d 723, 725-27 (Va. 2001) (finding that the military Survivor Benefit Plan, which provides

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[1] Virginia Courts have frequently ruled on arguments that federal law preempts state law. See, e.g., Dugan v. Childers, 261 Va. 3, 539 S.E.2d 723 (Va. 2001); Huver v. Commonwealth, No. 0276-08-04, 2009 WL 585919, at *1-4 (Va. Ct. App. Mar. 10, 2009); Harlow v. Bekins A-1 Movers, Inc., No. 199684, 2002 WL 1941138, at *2-4 (Va. Cir. Ct. July 2, 2002); Hobson v. United Companies Lending Corp., 41 Va. Cir. 524 (Va. Cir. Ct. 1997).

a similar right to designate a former spouse to receive annuity payments, preempted a constructive trust on the proceeds paid to the survivor beneficiary); see also Ridgway v. Ridgway, 454 U.S. 46, 60 (1981) (finding that the Servicemen's Group Life Insurance Act of 1965, a statutory scheme extremely analogous to FEGLIA, "prevail[ed] over and displace[d] inconsistent state law", including a constructive trust); Metropolitan Life Ins. Co. v. Zaldivar, 413 F.3d 119, 120-21 (1st Cir. 2005), aff'g 337 F. Supp. 2d 343, 347 (D. Mass. 2004) (finding that FEGLIA preempted a constructive trust remedy on the proceeds paid to the designated beneficiary); Metropolitan Life Ins. Co. v. Christ, 979 F.2d 575, 579 (7th Cir. 1992) (finding that FEGLIA preempted a constructive trust remedy on the proceeds paid to widow in accordance with Section 8705(a); Metropolitan Life Ins. Co. v. Barber, No. Civ.A.5:01-CV-025-C, 2001 WL 1683253, at *3 (N.D. Tex. Sept. 7, 2001) (finding that FEGLIA "broadly preempts any state law that directs payment to anyone other than a listed beneficiary"); Metropolitan Life Ins. Co. v. Armstrong-Lofton, 19 F. Supp. 2d 1134, 1136 (C.D. Cal. 1998) (finding that FEGLIA preempts California community property law which provides for the distribution of property to someone other than the designated beneficiary); Metropolitan Life

Ins. Co. v. Bell, 924 F. Supp. 63, 65 (E.D. Tex. 1995) (finding that FEGLIA preempts a constructive trust remedy that would provide payment to someone other than the designated beneficiary).

9. In determining whether the FEGLIA preempts Virginia Code § 20-111.1(D), the Court should not consider Plaintiff's equitable argument that as Decedent's widow, she is "the rightful recipient of Decedent's FEGLIA policy proceeds." See Complaint ¶ 44; see also Bell, 924 F. Supp. at 65 (stating that "delving into the equities of individual cases is precisely what the preemption language in FEGLIA, as interpreted, has been enacted to prevent"); Metropolitan Life Ins. Co. v. Holland, 134 F. Supp. 2d 1197, 1202 (D. Ore. 2001) (stating that "while the court is sympathetic to Holland's equitable argument, under FEGLIA, the equities are neither relevant nor determinative on the issue of who is entitled to FEGLI life insurance proceeds").

WHEREFORE, for the foregoing reasons, those which shall appear in the memorandum of law to follow, and those which will be urged upon the hearing of this matter, Defendant Judy A. Maretta respectfully moves this Honorable Court for entry of an Order sustaining her Demurrer to

Plaintiff's Complaint and granting her Plea in Bar, and for such other and further relief as this Court deems just and appropriate under the circumstances.

DATED: January 21, 2010

SANDS ANDERSON MARKS & MILLER
A Professional Corporation

/s/
George O. Peterson (VSB No. 44435)
gpeterson@sandsanderson.com
Courtney S. Schorr (VSB No. 65971)
cschorr@sandsanderson.com
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
(703) 893-3600
(703) 893-8484 (fax)

Counsel for Defendant Judy A. Maretta

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DEMURRER AND PLEA IN BAR was served this 21st day of January, 2010 by first class mail upon:

Daniel H. Ruttenberg, Esquire
SmolenPlevy
8045 Leesburg Pike, Suite 540
Vienna, Virginia 22182

/s/
Courtney S. Schorr

[Filed: July 2, 2010]

V I R G I N I A:

IN THE FAIRFAX COUNTY CIRCUIT COURT

JACQUELINE HILLMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.:**
	)	**CL 2009-15137**
JUDY A. MARETTA,	)	
	)	
Defendant.	)	
	)	

DEFENDANT JUDY A. MARETTA'S ANSWER AND GROUNDS OF DEFENSE

COMES NOW, Defendant Judy A. Maretta ("**Ms. Maretta**"), by counsel, and without waiving the issues raised in the Plea in Bar and Demurrer, files her Answer and Grounds of Defense to the Complaint filed by Plaintiff Jacqueline Hillman ("**Plaintiff**"), and states as follows:

ANSWER

For her response to the numbered paragraphs in the Complaint, Ms. Maretta states as follows:

1. Admit that Plaintiff is the widow of Warren Hillman and that she is a resident of the Commonwealth of Virginia, but deny that she was entitled to Warren Hillman's benefits under his Federal Employees' Group Life Insurance ("**FEGLI**") policy.

2. Admit that Ms. Maretta is a resident of the Commonwealth of Virginia and that she was divorced from Warren Hillman on December 29, 1998.

3. This paragraph is a restatement of previous paragraphs in the Complaint to which a response has already been given.

4. This paragraph contains a legal conclusion to which no response is necessary.

5. This paragraph contains a legal conclusion to which no response is necessary.

6. This paragraph is a restatement of previous paragraphs in the Complaint to which a response has already been given.

7. Admit that Ms. Maretta was paid the death benefits of Warren Hillman's FEGLI policy as she was the named beneficiary under the FEGLI policy and that as a matter of federal law she was the intended and correct recipient of such proceeds. Admit further that Plaintiff's cause of action is

based upon Ms. Maretta receiving the proceeds of Warren Hillman's FEGLI policy as mandated by federal law.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted, but further aver that no such orders, decrees of annulment or any written agreement was required in order for Ms. Maretta to receive the proceeds of Warren Hillman's FEGLI policy as she was the proper beneficiary under federal law.

12. Admitted, but deny that it is any way relevant to Ms. Maretta receiving the proceeds of Warren Hillman's FEGLI policy as she was the proper beneficiary under federal law.

13. Admitted.

14. Admitted, but aver that such was not necessary as federal law controls the payment of the proceeds of Warren Hillman's FEGLI policy.

15. Admitted, and aver that Warren Hillman, having full knowledge that he was required to file a change of beneficiary designation to make Plaintiff the beneficiary of his FEGLI policy, chose not to do so. Responding further, Ms. Maretta states that Warren Hillman, who married Ms. Maretta on May 7, 1989, did not make her the beneficiary of his FEGLI policy until seven years into their marriage.

16. Admit that Warren Hillman passed away on July 28, 2008 while married to Plaintiff.

17. Ms. Maretta does not have sufficient information to admit or deny the allegation in this paragraph and consequently must deny the same.

18. Ms. Maretta does not have sufficient information to admit or deny the allegation in this paragraph and consequently must deny the same. Responding further, Ms. Maretta avers that the federal Office of Personnel Management's purported response would have been required by federal law.

19. Admit that after being contacted and advised by the Office of Personnel Management that she was the proper beneficiary of Warren Hillman's FEGLI policy, Ms. Maretta filed the appropriate paperwork to receive the proceeds of Warren Hillman's FEGLI policy. Deny all

remaining characterizations and inferences asserted by this paragraph.

20. Admit that the Office of Personnel Management would have been prevented from disclosing the amount of the proceeds of Warren Hillman's FEGLI policy to Plaintiff, because Ms. Maretta is the sole named beneficiary under the policy. Admit further that Ms. Maretta received the proceeds of Warren Hillman's FEGLI policy as mandated by federal law.

21. Admit that Plaintiff spoke with Ms. Maretta regarding the proceeds of Warren Hillman's FEGLI policy, but deny that Ms. Maretta was requested to transfer the proceeds to Plaintiff or that the subject even came up during their conversation.

22. This paragraph is a restatement of previous paragraphs in the Complaint to which a response has already been given.

23. This paragraph is a recitation of a Virginia statute and no response is necessary.

24. This paragraph is a recitation of a Virginia statute and no response is necessary.

25. This paragraph is a recitation of a federal statute and no response is necessary.

26. Admitted for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

27. This paragraph is a recitation of a Virginia statute and no response is necessary, but

aver that such statute is preempted by federal law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

28. This paragraph is a recitation of a federal statute and no response is necessary.

29. In part this paragraph is a restatement of previous paragraphs in the Complaint to which a response has already been given. In response to the portion of this paragraph which is not a restatement of previous paragraphs, Ms. Maretta admits that after being contacted and advised by the Office of Personnel Management that she was the proper beneficiary of Warren Hillman's FEGLI policy, that Ms. Maretta filed the

appropriate paperwork to receive the proceeds of Warren Hillman's FEGLI policy.

30. Admitted that Ms. Maretta received the benefits from Warren Hillman's FEGLI policy as required by federal law.

31. This paragraph contains a legal conclusion to which no response is necessary, but aver that Virginia law is preempted by federal law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

32. Admitted, but state that federal law mandated that Ms. Maretta, as the named beneficiary, receive the benefits of Warren Hillman's FEGLI policy.

33. Denied and aver that Virginia law is preempted by federal law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

34. Denied and aver that Virginia law is preempted by federal law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

35. Denied and aver that Plaintiff's putative cause of action is preempted by federal law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof,

and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

36. Denied and aver that Plaintiff's putative cause of action is preempted by federal law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

37. Denied as phrased.

38. Denied.

39. Denied as phrased since no request was ever made by Plaintiff for Ms. Maretta to transfer the proceeds of Warren Hillman's FEGLI policy.

40 Denied and aver that Plaintiff's putative cause of action is preempted by federal

law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

41. Denied and aver that under federal law, which preempts state law, Ms. Maretta, as the named beneficiary, was the proper beneficiary of Warren Hillman's FEGLI policy.

42. Denied. Ms. Maretta was properly paid the proceeds of Warren Hillman's FEGLI policy as required by federal law.

43. Denied. Ms. Maretta was properly paid the proceeds of Warren Hillman's FEGLI policy as required by federal law.

44. Denied. Ms. Maretta was properly paid the proceeds of Warren Hillman's FEGLI policy as required by federal law.

45. Denied. Ms. Maretta was properly paid the proceeds of Warren Hillman's FEGLI policy as required by federal law.

46. Denied. Ms. Maretta was properly paid the proceeds of Warren Hillman's FEGLI policy as required by federal law.

47. Denied. Ms. Maretta was properly paid the proceeds of Warren Hillman's FEGLI policy as required by federal law.

48. Denied as upon information and belief, Plaintiff has retained counsel on a contingency fee basis. Further deny that there is any legal basis for Plaintiff's request for attorney's

fees and costs and that Plaintiff's failure to identify the basis for an award of attorney's fees as required by Supreme Court of Virginia Rule 3:25 waives any such claim to attorney's fees.

49. Ms. Maretta denies all allegations of the Complaint which have not been expressly admitted herein.

GROUNDS OF DEFENSE

For her Grounds of Defense to the Complaint, Ms. Maretta states as follows:

1. Plaintiff's putative cause of action is preempted by federal law for the reasons set forth in Ms. Maretta's Plea in Bar and Demurer, the briefs in support thereof, and the arguments raised at the hearing of the Plea in Bar and Demurrer on May 7, 2010.

2. Ms. Maretta reserves the right the right to seek leave to amend this Grounds of Defense to include any and all defenses that become known through the course of discovery and/or at trial.

WHEREFORE, having fully answered the Complaint, Defendant Judy A. Maretta, by counsel, respectfully requests that this Honorable Court enter judgment in her favor and for such additional relief as the Court deems just.

DATED: July 2, 2010

Respectfully submitted,

JUDY A. MARRETTA
By Counsel

PETERSON SAYLOR, PLC

/s/
George O. Peterson (VSB No. 44435)
gpeterson@petersonsaylor.com
Tania M. L. Saylor (VSB No. 65409)
tsaylor@petersonsaylor.com
4163 Chain Bridge Road
Fairfax, VA 22030
(703) 225-3620
(703) 225-3621 (fax)

Counsel for Defendant Judy A. Maretta

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer and Grounds of Defense was served this 2nd day of July, 2010 by electronic mail and first class mail upon:

Daniel H. Ruttenberg, Esquire
SmolenPlevy
8045 Leesburg Pike, Suite 540
Vienna, Virginia 22182

/s/
George O. Peterson

GRANTED ASSIGNMENT OF ERROR

The trial court erred in determining that Jacqueline Hillman's claim under Virginia Code § 20.1-111(D) was not preempted by federal law pursuant to the Federal Group Life Insurance Act, specifically 5 U.S.C. § 8709(d)(1), and awarding the Plaintiff summary judgment.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 22 2013
OFFICE OF THE CLERK

No. 11-1221

In the Supreme Court of the United States

JACQUELINE HILLMAN,

Petitioner,

v.

JUDY A. MARETTA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF FOR PETITIONER

DANIEL H. RUTTENBERG
Counsel of Record
ALAN B. PLEVY
KYUNG N. DICKERSON
BRET D. LEE
SMOLENPLEVY
8045 Leesburg Pike, Fifth Floor
Vienna, VA 22182
dhruttenberg@smolenplevy.com
(703) 790-1900

Dated: February 22, 2013

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QUESTION PRESENTED

VA. CODE ANN. § 20-111.1(D) (West 2009) creates a State domestic relations equitable cause of action against an ex-spouse after Metropolitan Life Insurance Company, Inc. ("MetLife") has paid Federal Employees Group Life Insurance ("FEGLI") proceeds to such ex-spouse in accordance with 5 U.S.C. § 8705(a) (2012).

The question presented is:

> Does 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 ("FEGLIA"), any regulation promulgated thereunder, or any provision of the contract ("Master Policy") entered into between the United States Office of Personnel Management ("OPM") and MetLife to administer the FEGLI program preempt the post-distribution equitable remedy contained in VA. CODE § 20-111.1(D)?

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3. The 1998 amendment to FEGLIA, which requires insurance proceeds to be paid in accordance with a properly filed divorce decree, coupled with the exclusion of such an amendment in SGLIA clearly shows, if not compels, a

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OPINIONS BELOW

The opinion of the Supreme Court of Virginia (Appendix to Petition for Writ of Certiorari (referred to herein as "Pet. App.") 1a-31a) is available at *Maretta v. Hillman*, 283 Va. 34, 722 S.E.2d 32 (Va. 2012). The Order of the Circuit Court of Virginia granting summary judgment (Pet. App. 32a-34a) is not reported. The letter opinion of the Circuit Court of Virginia overruling Respondent's Plea in Bar/Demurrer (Pet. App. 35a-58a) is available at *Hillman v. Maretta*, 80 Va. Cir. 439, No. CL 2009–15137, 2010 WL 7373701 (Va.Cir.Ct. June 25, 2010).

JURISDICTION

The Supreme Court of Virginia entered judgment on January 13, 2012. The deadline to file a petition for rehearing elapsed 30 days later on February 12, 2012. VA. SUP. CT. R. 5:37(d). This Court has jurisdiction to review the federal preemption issues decided by the Supreme Court of Virginia under 28 U.S.C. § 1257(a) (2012).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent text of the constitutional, statutory and regulatory provisions involved are set forth in the appendix to this brief. Below are their citations:

U.S. Const. art. VI, cl. 2, App. 1a;

5 U.S.C. § 8705 (2012), App. 1a-5a;

5 U.S.C. § 8709(d)(1) (2012), App. 5a;

5 C.F.R. § 870.802(f) (2012), App. 5a;

38 U.S.C. § 1970 (2012), App 6a-8a;

38 C.F.R. § 9.4 (2012), App. 8a-10a;

VA. CODE ANN. § 20-111.1 (West 2009) (amended 2012), App. 10a-11a; and

UNIF. PROBATE CODE § 2-804 (amended 2010), App. 12a-13a.

STATEMENT OF THE CASE

A. 5 U.S.C. § 8705(a) PREEMPTS VA. CODE § 20-111.1(A).

VA. CODE § 20-111.1(A) provides that a life insurance policy's revocable beneficiary designation, made prior to a divorce naming a spouse, is deemed revoked upon a divorce. VA. CODE ANN. § 20-111.1(A) (West 2009) (amended 2012), App. 10a. 5 U.S.C. § 8705(a) of FEGLIA creates a statutory order of precedence for the payment of FEGLI policy death benefits. 5 U.S.C. § 8705(a) (2012), App. 1a-3a. It provides that such proceeds shall first be paid to the beneficiaries properly designated by the employee, and if none, then to the widow(er) of the employee.[1]

In *Egelhoff v. Egelhoff*, this Court held that the Employee Retirement Income Security Act of 1974 ("ERISA") expressly preempted a Washington statute very similar to VA. CODE § 20-111.1(A).[2]

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[1] *Id.* If the Federal employee does not have a widow(er), 5 U.S.C. § 8705(a) then specifies that the death benefit should go to the employee's children, and if none, then parents, etc. *Id.* In this case, the Federal employee had a widow. *Hillman*, 2010 WL 7373701, *1, Pet. App. 37a.

[2] The Washington statute that was preempted, WASH. REV. CODE § 11.07.010(2)(a) (West 2001), and VA. CODE ANN. § 20-111.1(A) are both based on UNIF. PROBATE CODE § 2-804(b) (amended 2010), App. 12a. Eighteen States have adopted

532 U.S. 141, 148-150 (2001). This Court found that "the law was at fault for standing in the way of making payments 'simply by identifying the beneficiary specified by the plan documents,' . . . and thus for purporting to 'undermine the congressional goal of minimizing the administrative and financial burdens' on plan administrators." *Kennedy v. Dupont Sav. and Inv. Plan*, 555 U.S. 285, 303 (2009) (quoting *Egelhoff*, 532 U.S. at 149-150 (internal citations omitted). In other words, ERISA expressly preempted the pre-distribution equitable remedy contained in the Washington statute on the grounds of administrative convenience as Congress did not intend to "[r]equir[e] ERISA administrators to master the relevant laws of 50 States and to contend with litigation." *Egelhoff*, 532 U.S. at 149.

In *Kennedy*, the recent companion case to *Egelhoff*, this Court determined that a plan administrator was not permitted to honor a waiver of ERISA plan benefits contained in a divorce decree "and that the plan administrator did its statutory ERISA duty by paying the benefits to [the ex-wife] in conformity with the plan documents." *Kennedy*, 555 U.S. at 299-300. *Egelhoff* and *Kennedy* also stand for the proposition that

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statutes based upon U.P.C. § 2-804(b) (See n. 7 for a complete list of State statutes.)

FEGLIA expressly preempts VA. CODE § 20-111.1(A) on the same administrative convenience grounds.

B. WHETHER FEGLIA PREEMPTS VA. CODE § 20-111.1(D) IS THE QUESTION PRESENTED IN THIS CASE.

If VA. CODE § 20-111.1(A) is preempted by Federal law, VA. CODE § 20-111.1(D), makes a former spouse personally liable to the widow(er) (or whoever would otherwise be entitled to the insurance proceeds), for an amount equal to the life insurance proceeds received by the former spouse. VA. CODE ANN. § 20-111.1(D) (West 2009) (amended 2012), App. 10a-11a. VA. CODE § 20-111.1(D) is strictly a post-distribution family law equitable remedy.

VA. CODE § 20-111.1(D) is based on UNIF. PROBATE CODE § 2-804(h)(2) (amended 2012), App. 12a-13a. U.P.C. § 2-804(h)(2) is a direct response to the federal preemption of U.P.C. § 2-804(b) in ERISA cases. "This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits."

U.P.C. § 2-804 cmt. Twelve States have adopted U.P.C. § 2-804(h)(2).[3]

As discussed above, FEGLIA expressly preempts VA. CODE § 20-111.1(A). Accordingly, under VA. CODE § 20-111.1(D), a former spouse who receives FEGLI proceeds, not for value, is personally liable to the widow(er), etc. for an amount equal to such proceeds received. *Id.* VA. CODE § 20-111.1(D) does not authorize a court to place FEGLI proceeds in a constructive trust. It only makes the widow(er), etc. a general creditor of the former spouse.

While *Egelhoff* and *Kennedy* both stand for the proposition that FEGLIA expressly preempts VA. CODE § 20-111.1(A), neither of those cases suggest that FEGLIA expressly or impliedly preempts the post-distribution equitable remedy contained in VA. CODE § 20-111.1(D). To the contrary, this Court specifically stated in *Kennedy* that "we [do not] express any view as to whether the Estate could have brought an action in state or federal court against [the ex-wife] to obtain the benefits after they were distributed." *Kennedy*, 555 U.S. at 299 n. 10.[4] Whether FEGLIA preempts VA.

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[3] See n. 8 for a complete list of State statutes.

[4] The large majority Federal and State courts have held that ERISA does not preempt post-distribution State laws. *Estate*

CODE § 20-111.1(D) is the question presented in this case.

C. FACTS OF THE CASE

The relevant facts in this case are not in dispute. *Hillman*, 2010 WL 7373701, *1, n. 1, Pet. App. 37a. On December 2, 1996, Warren Hillman ("Insured") named Respondent/Defendant Judy Maretta ("Ex-Wife"), his wife at the time, as the beneficiary of his FEGLI policy. *Id.* at 1, Pet. App. 37a. Insured and Ex-Wife divorced on December

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of Kensinger v. URL Pharma, Inc., 674 F.3d 131, 136-139 (3rd Cir. 2012); *Kickham Hanley P.C. v. Kodak Ret. Income Plan*, 558 F.3d 204, 211 (2nd Cir. 2009); *Hoult v. Hoult*, 373 F.3d 47, 54-55 (1st Cir. 2004); *Central States Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 678-79 (6th Cir. 2000); *Wright v. Riveland*, 219 F.3d 905, 919-21 (9th Cir. 2000); *Guildry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1082-83 (10th Cir. 1994); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54-56 (3rd Cir. 1994); *Partlow v. Person*, 798 F. Supp. 2d 878 (E.D. Mich. 2011); *Brandenberg v. Watson*, No. 3:10–CV–346, 2011 WL 609796 (S.D. Ohio Feb. 10, 2011); *Morris v. Met. Life Ins. Co.*, 751 F. Supp. 2d 955 (E.D. Mich. 2010); *Hall v. Hall*, no. 09–3522, 2009 WL 2837720 (E.D. Pa. Sept. 03, 2009); *McCalip v. Met. Life Ins. Co.*, No. 08–12806, 2009 WL 1883533 (E.D. Mich. June 30, 2009); *Alcorn v. Appleton*, 708 S.E.2d 390 (Ga. Ct. App. 2011); *Sweebe v. Sweebe*, 712 N.W.2d 708, 710-11 (Mich. 2006); *Reed Estate v. Reed*, 810 N.W.2d 284 (Mich. Ct. App. 2011); *Brown v. Wright*, No. 285509, 2009 WL 2952682 (Mich. Ct. App. Sept. 15, 2009); *Pardee v. Pardee*, 112 P.3d 308 (Okla. Civ. App. 2004); *Estate of Sauers*, 971 A.2d 1265 (Pa. Super. Ct. 2009); *but see Langevin v. McMorrow*, No. 10–P–1591, 2011 WL 2436748 (Mass. App. Ct. June 20, 2011).

29, 1998. *Id.* Insured married Petitioner/Plaintiff Jacqueline Hillman ("Widow") on October 11, 2002. *Id.* Insured, however, never changed the beneficiary designation on his FEGLI policy after he divorced Ex-Wife. *Id.* Insured died unexpectedly about six years later on July 28, 2008. *Id.* At the time of his death, Insured was still married to Widow. *Id.* After her husband's death, Widow filed a claim for benefits under Insured's FEGLI policy but was told the proceeds would be distributed to Insured's designated beneficiary, Ex-Wife. *Id.* In October of 2008, Ex-Wife filed a claim for and received the death benefits under the FEGLI policy in the amount of $124,558.03. *Id.* No provision of FEGLI's Master Policy was admitted into evidence in this case. *See Maretta*, 722 S.E.2d at 33, n. 1, Pet. App. 3a. The United States Solicitor General sought leave to lodge a copy of FEGLIA's Master Policy with this Court on December 14, 2012. Letter from Solicitor General to United States Supreme Court proposing a lodging of the Master Policy (Dec. 14, 2012) (on file with the Clerk of Court) (hereinafter referred to as "SG Lodg.")

D. PROCEDURAL POSTURE

On October 28, 2009, Widow filed a Complaint against Ex-Wife in the Circuit Court of

Fairfax County, Virginia, seeking damages under VA. CODE § 20-111.1(D) in an amount equal to the proceeds Ex-Wife received from Insured's FEGLI policy. Complaint, Jt. App. 6-17. Ex-Wife filed a Demurrer and Plea in Bar to Widow's Complaint claiming that FEGLIA preempts VA. CODE § 20-111.1(D). Demurrer and Plea In Bar, Jt. App. 18-26.

On June 25, 2010, in ruling on Ex-Wife's Demurrer and Plea In Bar, the Honorable Michael F. Devine of the Circuit Court of Fairfax County held "that Virginia Code § 20-111.1(D) is not preempted by FEGLIA." *Hillman*, 2010 WL 7373701, *10, Pet. App. 58a. The trial court then granted Widow summary judgment on the same grounds. Order Granting Summary Judgment, Pet. App. 32a-34a. Ex-Wife appealed the trial court's award of summary judgment to the Supreme Court of Virginia. A divided Supreme Court of Virginia "reverse[d] the judgment of the circuit court." *Maretta*, 722 S.E.2d at 38, Pet. App. 16a.

On April 11, 2012, Widow filed a Petition for a Writ of Certiorari in this Court requesting review of the judgment of the Supreme Court of Virginia. On January 11, 2013, this Court granted the Petition.

SUMMARY OF ARGUMENT

VA. CODE § 20-111.1(D) is not preempted by 5 U.S.C. § 8705(a), any other provision of FEGLIA, any regulation promulgated thereunder, or any provision of FEGLIA's Master Policy. VA. CODE § 20-111.1(D), App. 11a, embodies a State post-distribution domestic relations equitable remedy, and there is a strong presumption against preemption of domestic relations laws. "State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

The Federal government has a strong interest in seeing that FEGLI proceeds are received by Federal employees' intended beneficiaries. Virtually all States have laws which reflect that, absent a post-divorce indication to the contrary, a pre-divorce testamentary direction in favor of an ex-spouse no longer reflects an individual's intentions.[5] Therefore, VA. CODE § 20-111.1(D) advances the Federal government's purposes by conferring the benefit of FEGLI proceeds upon

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[5] See n. 6 for a list of State statutes which invalidate pre-divorce references to ex-spouses in wills.

Federal employees' intended beneficiaries instead of their ex-spouses. Since the Federal government and Virginia share the same interest in allowing VA. CODE § 20-111.1(D) to operate, the required major damage to a Federal interest does not exist.

There are several types of preemption, but the two types that are relevant here are express preemption and the subset of implied preemption which occurs when State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). However, neither type preempts VA. CODE § 20-111.1(D).

FEGLIA does not impliedly preempt VA. CODE § 20-111.1(D) because VA. CODE § 20-111.1(D) does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting FEGLIA. *English*, 496 U.S. at 79. This Court determined that Congress intended for Servicemen's Group Life Insurance ("SGLI") proceeds to be protected from creditors in the hands of service members' intended beneficiaries. *Ridgway v. Ridgway*, 454 U.S. 46, 53 (1981). The Virginia Supreme Court determined that because FEGLIA and the Servicemen's Group Life Insurance Act of 1965 ("SGLIA") have the same statutory order of

precedence, this Court's opinion in *Ridgway* compelled a finding that FEGLI proceeds enjoy the same creditor protection as SGLI proceeds. *Maretta*, 722 S.E.2d at 36-37, Pet. App 12a-13a. However, a statutory order of precedence would be required in any well written insurance act and should not be a basis for conflating their purposes. Instead, FEGLIA's purposes and objectives should be surmised from FEGLIA's text and legislative history.

A textual review of FEGLIA shows that Congress declined to include SGLIA's anti-attachment provision, 38 U.S.C. § 1970(g) (2012), App. 7a-8a, in FEGLIA when it amended SGLIA in 1970. This purposeful act showed Congress's clear intention that SGLIA was to have a much broader preemptive scope. Furthermore, following a string of cases in which courts preempted State divorce orders on the grounds that FEGLI proceeds belonged to the designated beneficiaries regardless of the equities in the case, Congress made an another affirmative statement that Congress did care about the equities involved when it amended FEGLIA in 1998. Congress added 5 U.S.C. § 8705(e) (2012), App. 3a-5a, to permit enforcement of State divorce orders pre-distribution. Congress did not add a similar provision to SGLIA, which again emphasizes the different objectives behind

the two Acts. Another distinction between the Acts is that FEGLIA has a limited express preemption provision, 5 U.S.C. § 8709(d)(1), App. 5a. 5 U.S.C. § 8709(d)(1) gives Congress's well-defined indication of FEGLIA's preemptive reach, and a further reach should not be inferred from FEGLIA's other provisions. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Congress has acted with force and clarity in distinguishing FEGLIA from SGLIA to indicate that State laws should be respected post-distribution with regard to FEGLI proceeds.

FEGLIA's legislative history confirms this Congressional intent, especially in light of SGLIA's legislative history. SGLIA was designed for service members to be able to obtain affordable life insurance regardless of the hazards they were facing and that meant special protection for their beneficiaries. *Ridgway*, 454 U.S. at 53. Conversely, FEGLIA was motivated by a desire to offer Federal employees low cost insurance so they would be better able to carry out responsibilities to their families and to make the Federal government more competitive in the job market. S. Rep. No. 83-1654, at 5 (1954), *as reprinted* in 1954 U.S.C.C.A.N. vol. 2 3056.

Additionally, FEGLIA's express preemption provision, 5 U.S.C. § 8709(d)(1), App. 5a, does not

expressly preempt VA. CODE § 20-111.1(D). 5 U.S.C. § 8709(d)(1) only makes preemptive provisions of the Master Policy, none of which are in the record. Accordingly, Ex-Wife cannot properly contend that 5 U.S.C. § 8709(d)(1) expressly preempts VA. CODE § 20-111.1(D) in this case. Assuming this Court takes judicial notice of the provisions of the Master Policy, 5 U.S.C. § 8709(d)(1) still does not expressly preempt VA. CODE § 20-111.1(D) because 5 U.S.C. § 8709(d)(1) only preempts State laws that are inconsistent with the Master Policy. *Id.* However, VA. CODE § 20-111.1(D) is ***consistent*** with the Master Policy. It is universally acknowledged that, absent an indication to the contrary, most people do not want pre-divorce testamentary directions in favor of an ex-spouse to be honored. Therefore, while not impacting the administration of the FEGLI plan, VA. CODE § 20-111.1(D) furthers FEGLIA's purpose of Federal employees' intended beneficiaries receiving the benefit of FEGLI proceeds.

Furthermore, 5 U.S.C. § 8709(d)(1) does not expressly preempt VA. CODE § 20-111.1(D) because it does not "relate to group life insurance." 5 U.S.C. § 8709(d)(1), App. 5a. VA. CODE § 20-111.1(D) does not relate to group life insurance because it does not reference or have a prohibited connection to group life insurance. Since 5 U.S.C. § 8709(d)(1)

was enacted to enhance the administrative convenience of FEGLI and since VA. CODE § 20-111.1(D) does not impact the administration of FEGLI, VA. CODE § 20-111.1(D) does not have a forbidden connection to group life insurance.

The conclusion that 5 U.S.C. § 8709(d)(1) does not preempt VA. CODE § 20-111.1(D) is dramatically reinforced when viewed against the backdrop of: 1) the presumption against preemption of State laws generally; 2) the much stronger presumption against preemption of family laws, which requires "major damage" to "clear and substantial" Federal interests; 3) the lack of any Federal interest in preventing States from enforcing post-distribution equitable remedies; 4) the required "modest reading" of the terms of the negotiated Master Policy with regard to their preemptive effect; 5) the strong presumption against preemption when, as in this case, the Federal government and the States share the same interests; and 6) OPM's policy of permitting States to enforce their laws against the recipients of FEGLI proceeds, as evidenced by the express preemption language in the Master Policy which specifically permits States to enforce their tax laws post-distribution.

This Court should adopt a bright-line rule which preempts pre-distribution State laws, but allows post-distribution State laws. Such a rule permits States to regulate domestic relations and family matters without impacting the administration of the FEGLI plan.

ARGUMENT

I. PREEMPTION GENERALLY

a. FEGLIA Does Not Preempt A State Domestic Relations Equitable Remedy Like VA. CODE § 20-111.1(D) Unless The State Law Does "Major Damage" To A "Clear And Substantial" Federal Interest.

Preemption has its roots in Article VI, cl. 2, of the United States Constitution, which states that "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." However, this Court has "never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue*

Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1997). This presumption becomes exceptionally "strong" when the State law in question comes under a State's historic police power. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). This Court has repeatedly assumed "that historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001) (quoting *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (in turn quoting *Travelers*, 514 U.S. at 655 (in turn quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)))).

It has long been recognized that States have historic police powers to regulate domestic relations and family law. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-594 (1890)). Therefore, the presumption against preemption of domestic relations and family laws is much stronger and the standard for finding preemption is much higher than for other States' laws. *Id.*; *Travelers*, 514 U.S.

at 655. "A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo*, 439 U.S. at 581 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)). Therefore, Congressional purposes must be examined to determine the Federal interest behind the legislation in question as well as the effect the threatened State law has on that Federal interest. *Cipollone*, 505 U.S. at 516 ("[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis.") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (in turn quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

Normally there is an added presumption against preemption of State laws when the Federal government and the State share the same interests. *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666-667 (2003); *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 413, 421 (1973). However, since State family law must conflict with and damage a Federal interest before Federal law preempts State law, logic dictates that, absent a competing Federal interest to the contrary, when the Federal government and the State share the same interest,

preemption cannot lie. At a minimum, the relative strengths of competing State and Federal interests must be taken into account in any preemption analysis. *Lorillard*, 533 U.S. at 569 (Federal Cigarette Labeling and Advertising Act preempted State law regulating tobacco advertising when State did not have a strong interest, but did not preempt a different State law regulating advertising when State "demonstrated a substantial interest."); *Yazell*, 382 U.S. at 358 (Harlan, J., concurring); *see United States v. O'Brien,* 391 U.S. 367, 382 (1968).

b. The Federal Government And The States Want FEGLI Proceeds To Go To Intended Beneficiaries In Accordance With VA. CODE § 20-111.1(D); Since There is No Competing Federal Interest To The Contrary, VA. CODE § 20-111.1(D) Does Not Do Major Damage To A Federal Interest.

The Federal government and the States share the same strong interest behind VA. CODE § 20-111.1(D) – they want FEGLI proceeds to go to the intended beneficiaries. Therefore, VA. CODE § 20-111.1(D) does not do the requisite "major damage" to such Federal interests needed to find

preemption. *Hisquierdo*, 439 U.S. at 581. Instead, it furthers the Federal government's interests.

President Eisenhower explained the two main Federal interests behind establishing a group life insurance plan for Federal civilian employees, when he proposed the FEGLI program to Congress. S. Rep. No. 83-1654, at 5 (1954), *as reprinted* in 1954 U.S.C.C.A.N. vol. 2 3056.

> In summary, two predominant features make this plan especially advantageous to the Government and its personnel. First, employees are better enable by this low-cost life-insurance protection to carry out their responsibilities to their families. Second, the plan is another essential element in the development of a comprehensive personnel program that applies to Government service the best practices of progressive, private employers.

Id. Both of these purposes are advanced when Federal employees' intended beneficiaries receive the benefits from FEGLI policies. Therefore, the Federal government shares the States' interest in making sure that FEGLI proceeds end up in the

hands of intended beneficiaries, and VA. CODE § 20-111.1(D) is designed to do just that.

It is universally recognized that, absent a post-divorce indication to the contrary, most divorced individuals want their assets to be inherited by family members instead of ex-spouses. Virtually every State has enacted statutes which invalidate pre-divorce references to an ex-spouse in a will.[6] Furthermore, eighteen States[7] have

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[6] Alabama, ALA. CODE § 43-8-137 (2012); Alaska, ALASKA STAT. § 13.12.804 (2012); Arizona, ARIZ. REV. STAT. ANN. § 14-2804 (2012); Arkansas, ARK. CODE ANN. § 28-25-109 (West 2012); California, CAL. PROB. CODE § 6122 (West 2012); Colorado, COLO. REV. STAT. ANN. § 15-11-804 (West 2013); Connecticut, CONN. GEN. STAT. § 45A-257C (West 2013); Delaware, DEL. CODE ANN. TIT. 12, § 209 (2012); Florida, FLA. STAT. ANN. § 732.507 (West 2012); Georgia, GA. CODE ANN. § 53-4-49 (West 2012); Hawaii, HAW. REV. STAT. § 560:2-804 (2012); Idaho, IDAHO CODE ANN. § 15-2-508 (2012); Illinois, 755 ILL. COMP. STAT. § 5/4-7 (West 2012); Indiana, IND. CODE ANN. § 29-1-5-8 (West 2012); Iowa, IOWA CODE § 633.271 (West 2012); Kansas, KAN. STAT. ANN. § 59-610 (2012); Kentucky, KY. REV. STAT. ANN. § 394.092 (West 2012); Louisiana, LA. CIV. CODE ANN. ART. 1608 (2012); Maine, ME. REV. STAT. ANN. TIT. 18-A, § 2-508 (2011); Maryland, MD. CODE ANN., EST. & TRUSTS § 4-105 (West 2012); Massachusetts, MASS. GEN. LAWS ANN. CH. 190B, § 2-802 (West 2012); Michigan, MICH. COMP. LAWS ANN. § 700.2807 (West 2012); Minnesota, MINN. STAT. ANN. § 524.2-804 (West 2012); Missouri, MO. ANN. STAT. § 474.420 (West 2012); Montana, MONT. CODE ANN. § 72-2-814 (2011); Nebraska, NEB. REV. STAT. § 30-2333 (2012); Nevada, NEV. REV. STAT. ANN. § 133.115 (West 2011); New Hampshire, N.H. REV. STAT. ANN. § 551:13 (2013); New Jersey, N.J. STAT. ANN. § 3B:3-14 (West 2013); New Mexico, N.M. STAT. ANN. §

45-2-804 (West 2012); New York, N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney 2013); North Carolina, N.C. GEN. STAT. § 31-5.4 (WEST 2012); North Dakota, N.D. CENT. CODE § 30.1-10-04 (2011); Ohio, OHIO REV. CODE ANN. § 2107.33 (West 2011); Oklahoma, OKLA. STAT. ANN. TIT. 84, § 114 (West 2012); Oregon, OR. REV. STAT. ANN. § 112.315 (West 2012); Pennsylvania, 20 PA. CONS. STAT. ANN. § 2507 (West 2012); Rhode Island, R.I. GEN. LAWS § 33-5-9.1 (2012); South Carolina, S.C. CODE ANN. § 62-2-507 (2012); South Dakota, S.D. CODIFIED LAWS § 29A-2-804 (2012); Tennessee, TENN. CODE ANN. § 32-1-202 (West 2012); Texas, TEX. PROB. CODE ANN. § 69 (Vernon 2011); Utah, UTAH CODE ANN. § 75-2-804 (West 2012); Virginia, VA. CODE ANN. § 64.1-59 (West 2012); Washington, WASH. REV. CODE ANN. § 11.12.051 (West 2012); West Virginia, W. VA. CODE ANN. § 41-1-6 (West 2012); Wisconsin, WIS. STAT. ANN. § 854.15 (West 2012); and Wyoming, WYO. STAT. ANN. § 2-6-118 (2012). Mississippi and Vermont are the only states which lack invalidation-by-divorce statutes applicable to wills.

[7] Alaska, ALASKA STAT. § 13.12.804 (2012); Arizona, ARIZ. REV. STAT. ANN. § 14-2804 (2012); Colorado, COLO. REV. STAT. ANN. § 15-11-804 (West 2013); Hawaii, HAW. REV. STAT. § 560:2-804 (2012); Massachusetts, MASS. GEN. LAWS ANN. CH. 190B, § 2-804 (West 2012); Michigan, MICH. COMP. LAWS ANN. § 700.2807 (West 2012); Missouri, MO. ANN. REV. STAT. § 461.051 (West 2012); Montana, MONT. CODE ANN. § 72-2-814 (2011); New Mexico, N.M. STAT. ANN. § 45-2-804 (West 2012); North Dakota, N.D. CENT. CODE § 30.1-10-04 (2011); Oklahoma, OKLA. STAT. ANN. TIT. 15, § 178 (2012); Pennsylvania, 20 PA. CONS. STAT. ANN. § 6111.2 (West 2012); South Dakota, S.D. CODIFIED LAWS § 29A-2-804 (2012); Texas, TEX. FAM. CODE ANN. § § 9.301-.302 (Vernon 2011); Utah, UTAH CODE ANN. §§ 30-3-7.5, 75-2-804 (West 2012); Virginia, VA. CODE ANN. §§ 20-111.1(A), 38.2-305 (West 2012); Washington, WASH. REV. CODE ANN. § 11.07.010 (West 2012); and Wisconsin, WIS. STAT. ANN. § 854.15 (West 2012).

adopted U.P.C. § 2-804(b), and twelve States[8] have adopted U.P.C. § 2-804(h)(2). Such laws are "consistent with human experience; and those with expertise in the matter have concluded that it 'more often' serves the cause of 'justice.'" *Egelhoff*, 532 U.S. at 159 (Breyer, J., dissenting) (internal citations omitted); John H. Langbein, *The Nonprobate Revolution and the Future of Succession*, 97 Harv. L. Rev. 1108, 1135 (1984). Therefore, absent a post-divorce indication to the contrary, it is generally presumed that pre-divorce testamentary directions in favor of an ex-spouse no longer reflect an individual's intentions.

These invalidation laws are designed to prevent the unjust enrichment that is likely to occur when an ex-spouse inherits assets, instead of the decedent's widow, children, etc.[9] More

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[8] Alaska, ALASKA STAT. § 13.12.804(i) (2012); Colorado, COLO. REV. STAT. ANN. § 15-11-804(8)(b) (West 2013); Hawaii, HAW. REV. STAT. § 560:2-804(h)(2) (2012); Massachusetts, MASS. GEN. LAWS ANN. CH. 190B, §2-804(h)(2) (West 2012); Michigan, MICH. COMP. LAWS ANN. § 700.2809 (West 2012); Montana, MONT. CODE ANN. § 72-2-814(8)(b) (2011)code,; New Mexico, N.M. STAT. ANN. § 45-2-804(I) (West 2012); North Dakota, N.D. CENT. CODE § 30.1-10-04(8)(b) (2011); South Dakota, S.D. CODIFIED LAWS § 29A-2-804(h)(2) (2012); Utah, UTAH CODE ANN. § 75-2804(8)(b) (West 2012); Virginia, VA. CODE ANN. § 20-111.1(D) (West 2012); and Wisconsin, WIS. STAT. ANN. § 854.26 (West 2012).

[9] *Egelhoff*, 532 U.S. at 159 (Breyer, J., dissenting). *See* Sarabeth A. Rayho, *Divorcees Turn about in Their Graves as*

importantly, these invalidation laws enable Federal employees "to carry out their responsibilities to their families" who are often in a vulnerable financial state after losing a Federal employee's earnings. S. Rep. No. 83-1654, at 5 (1954).

The Virginia Supreme Court did not suggest the existence of a Federal interest that conflicts with FEGLI proceeds going to a Federal employee's intended, albeit undesignated, beneficiary. It did not even propose the existence of a Federal interest which conflicts with post-distribution enforcement of State family laws in general. Instead of finding such a clear and substantial Federal interest, the court simply theorized that "Congress intended to establish . . . an inflexible rule that the beneficiary [would keep] the policy proceeds, regardless of . . . the equities in a particular case." *Maretta*, 722 S.E.2d at 35, Pet. App. 9a (quoting *O'Neal v. Gonzalez*, 839 F.2d 1437, 1440 (11th Cir. 1988)). However, no such conflicting Federal interests exist, and any attempts to speculate at such would be unsupported by FEGLIA's text and legislative history. Thus, they could not survive the strong

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Ex-Spouses Cash in: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans, 106 Mich. L. Rev. 373, 377 (2007) (citing Susan N. Gary, *Applying Revocation-On-Divorce Statutes to Will Substitutes*, 18 Quinnipiac Prob. L.J. 83, 120 (2004)).

presumption that the Federal government does not have such an interest.

VA. CODE § 20-111.1(D) furthers the interest of having FEGLI proceeds go to the intended beneficiaries of Federal employees without impacting the Federal government's interest of convenient administration of FEGLI policies. This interest is shared by all States and the Federal government. There is no competing Federal interest to the contrary. The aligned interests of the States and the Federal government to allow laws like VA. CODE § 20-111.1(D) to operate generally adds to the presumption against preemption. *Walsh*, 538 U.S. at 666-667; *Dublino*, 413 U.S. at 413, 421. However, since VA. CODE § 20-111.1(D) is a domestic relations equitable remedy, it simply cannot and does not do the required "major damage" to a Federal interest it is furthering. Accordingly, preemption is inappropriate in this case. As this Court eloquently stated, "[i]n so far as marriage is within temporal control, the States lay on the guiding hand." *Hisquierdo*, 439 U.S. at 581.

c. There Are Three Categories Of Preemption – Express, Implied And Field – And None Of Them Apply In This Case.

Preemption is generally referred to in three categories – express preemption, implied preemption and field preemption.[10] *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). However, as discussed herein, none of these types of preemption apply to VA. CODE § 20-111.1(D).

Express preemption occurs when "State action [is] foreclosed by express language in a congressional enactment." *Lorillard*, 533 U.S. at 541; *see English*, 496 U.S. at 78-79. Implied preemption is generally broken into two categories. Under the first category, implied preemption occurs when "state law is pre-empted to the extent that it actually conflicts with federal law" (referred to herein as "Direct Conflict Preemption"). *English*,

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[10] Express preemption is its own category. However, field preemption is sometimes included as a subset of implied preemption. *FMC Corp. v. Holliday*, 498 U.S. 52, 56 (1990) ("Preemption may be either express or implied."); *English*, 496 U.S. at 79 n. 5 ("Indeed, field pre-emption may be understood as a species of conflict pre-emption). Additionally, implied preemption is often referred to as "conflict preemption," *Id.* at 79, and has even been referred to as "implied conflict pre-emption." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002).

496 U.S. at 79. "Thus, the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements." *Id.* However, the more common form of implied preemption (and the one at issue in this case) occurs when "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (referred to herein as "Indirect Conflict Preemption"). *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Field preemption occurs when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone*, 505 U.S. at 516.[11]

II. 5 U.S.C. § 8709(d)(1) DOES NOT IMPLIEDLY PREEMPT VA. CODE § 20-111.1(D).

Indirect Conflict Preemption is discussed first in this brief since it is the crux of the split

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[11] Congress has not tried to occupy the field of domestic relations laws as it applies to FEGLI benefits and no one has suggested otherwise. There is no Federal remedy available for Widow or to address many other injustices that are remedied through State laws (i.e., community property rights, breach of premarital agreements, fraud, other descent and distribution rights, etc.). Accordingly, field preemption is not discussed herein.

between the courts which have ruled on FEGLIA preemption cases.

a. VA. CODE § 20-111.1(D) Does Not Stand As An Obstacle To The Accomplishment And Execution Of The Full Purposes And Objectives Of Congress Underlying FEGLIA.

Indirect Conflict preemption applies in this case only if VA. CODE § 20-111.1(D) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting FEGLIA. *English*, 496 U.S. at 79. This Court has determined that one of Congress's purposes was for SGLI proceeds to be protected from creditors when in the hands of the intended beneficiary. *Ridgway v. Ridgway*, 454 U.S. 46, 53 (1981). Courts which have held that FEGLI proceeds enjoy this same benefit have erroneously done so by assuming that the purposes behind FEGLIA are the same as the purposes behind SGLIA. This flawed assumption is based on the fact that FEGLIA and SGLIA have similar statutory orders of precedence. However, such a provision would be required in any well written insurance act and should not be a basis for conflating their purposes. Instead, FEGLIA's

purposes and objectives should be surmised from FEGLIA's text and legislative history.

A textual review of FEGLIA shows that Congress declined to include SGLIA's anti-attachment provision, 38 U.S.C. § 1970(g), in FEGLIA which was Congress's clearest indication that it wanted SGLIA to have a much broader preemptive scope which expressly includes post-distribution equitable remedies. Furthermore, following a string of cases in which courts preempted State divorce orders on the grounds that FEGLI proceeds belonged to the designated beneficiaries regardless of the equities in the case, Congress made an affirmative statement to the contrary when it amended FEGLI (adding 5 U.S.C. § 8705(e)) to include a mechanism to enforce State divorce orders pre-distribution. Additionally, FEGLIA's express preemption provision, 5 U.S.C. § 8709(d)(1), is Congress's clear indication of FEGLIA's intended preemptive reach. Congress has acted with force and clarity in distinguishing FEGLIA from SGLIA so that State laws will be respected post-distribution with regard to FEGLI proceeds.

This intention is also evident from FEGLIA's legislative history, especially when compared to that of SGLIA's. SGLIA was designed for service

members to be able to obtain affordable life insurance regardless of the hazards they were facing and that meant special protection for their beneficiaries as well. Conversely, FEGLIA was motivated by a desire to offer Federal employees low cost insurance so they would be better able to carry out responsibilities to their families and to make the Federal government more competitive in the job market.

Even if this Court determines that Congress intended to protect FEGLI proceeds from beneficiaries' creditors, VA. CODE § 20-111.1(D) helps advance that purpose by conferring the benefit of FEGLI proceeds on Federal employees' intended beneficiaries instead of their ex-spouses.

1. The Supreme Court of Virginia erred by looking to the purposes and objectives of SGLIA instead of FEGLIA to determine FEGLIA's preemptive scope.

In *Ridgway*, this Court held that a State divorce judgment requiring a service member to maintain his children as the beneficiaries of his SGLI policy was preempted. 454 U.S. at 60. The Supreme Court of Virginia noted that FEGLIA had the same order of precedence as the SGLIA and

similar regulations. *Maretta*, 722 S.E.2d, at 35, Pet. App. 9a. It therefore "considered *Ridgway* to be highly persuasive, if not binding in construing FEGLIA." *Id.* (citations omitted). Most of the other courts which have found that FEGLIA preempts post-distribution State laws have also relied on *Ridgway* directly, or have cited to a case that relies on *Ridgway* for its holding.[12] *Ridgway* dealt with SGLIA. Therefore, these courts' reliance on *Ridgway* is misplaced because the proper interpretation of FEGLIA's preemptive force comes from the differences between FEGLIA and SGLIA, not the similarities.

In *Ridgway*, Army Sergeant Ridgway was insured by a SGLI policy. *Ridgway*, 454 U.S. at 46. As part of Sergeant Ridgway's divorce, the Maine court ordered him to maintain his children as the beneficiaries of his SGLI policy. *Id.* at 48. After his divorce, Sergeant Ridgway changed his beneficiary designation so that the proceeds from

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[12] *Metropolitan Life Ins. Co. v. Zaldivar*, 413 F.3d 119, 120-21 (1st Cir. 2005) (citing *Ridgway*); *Metro. Life Ins. Co. v. Christ*, 979 F.2d 575, 578-81 (7th Cir. 1992) (citing *Ridgway*); *Metro. Life Ins. Co. v. McShan*, 577 F. Supp. 165, 167-69 (N.D. Cal. 1998) (citing *Ridgway*); *Metro. Life Ins. Co. v. Potter*, 533 So.2d 589, 594-95 (Ala. 1988) (citing *Ridgway*); *O'Neal*, 839 F.2d at 1439 (citing *McShan*); *Dean v. Johnson*, 881 F.2d 948-49 (10th Cir. 1989) (citing *O'Neal* and *McShan*), *Metro. Life Ins. Co. v. Sullivan*, 96 F.3d 18, 20 (2nd Cir. 1996) (citing *Christ*, *Dean* and *O'Neal*).

his SGLI policy would go to his new wife under the statutory order of precedence in SGLIA. *Id.* Sergeant Ridgway's ex-wife sued the insurance company on behalf of her children seeking to have the proceeds of the SGLI policy placed in a constructive trust for the benefit of his children. *Id.* at 49.

Ridgway had two holdings. In the second, this Court held that SGLIA's anti-attachment provision expressly preempted the State equitable remedy (i.e., the State divorce judgment). FEGLIA does not have an anti-attachment provision, so this second holding is not applicable to FEGLIA. *Ridgway's* first holding was that SGLIA's statutory order of precedence,[13] and the regulations related thereto[14] impliedly preempted the State equitable

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[13] In its opinion, this Court noted what it considered the relevant provisions of SGLIA. 38 U.S.C. § 1970(a) (statutory order of precedence, App. 6a-7a) and 38 U.S.C. § 1970(g) (anti-attachment, App 7a-8a). SGLIA is currently located at 38 U.S.C. § 1965, *et. seq.* When *Ridgway* was decided SGLIA was located at 38 U.S.C. § 767, *et. seq.* Its statutory order of precedence was located at 38 U.S.C. §770(a), and its anti-attachment provision was located at 38 U.S.C. § 770(g).

[14] This Court noted that the regulations

> provide that the insured "may designate any person, firm, corporation or legal entity" as a policy beneficiary, and any such "designation or change of beneficiary ... will take effect only if it is in writing, signed by the insured and received [by the appropriate office] prior to the

remedy. *Id.* at 60. The courts which rely on *Ridgway* to find that FEGLIA impliedly preempts State equitable remedies, do so solely on *Ridgway's* first holding.[15]

Because "both FEGLIA and SGLIA contain identical 'order of precedence provisions' . . . [and because r]egulations promulgated pursuant to

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> death of the insured." 38 CFR §§ 9.16(a) and (d) (1980). A change of beneficiary "may be made at any time and without the knowledge or consent of the previous beneficiary." § 9.16(e). And "[n]o change or cancellation of beneficiary ... in a last will or testament, or in any other document shall have any force or effect unless such change is received by the appropriate office." § 9.16(f).

Id. at 54. The analogous regulations currently in force are located at 38 C.F.R. § 9.4 (2012), App. 8a-10a.

[15] *Maretta*, 722 S.E.2d at 37-38, Pet. App. 14a-16a; *Christ*, 979 F.2d at 581; *McShan*, 577 F. Supp. at 169; *see Potter*, 533 So.2d at 594; *Zaldivar*, 413 F.3d at 120-21. However, it is not safe to assume that *Ridgway's* first holding addressed State laws which affected post-distribution FEGLI proceeds. Since *Ridgway* dealt with a pre-distribution claim against insurance proceeds, either of *Ridgway's* two holdings was sufficient to warrant preemption. However, the trial court in this case determined that *Ridgway's* first holding only required that benefits be paid in accordance with the statutory order of precedence and did not speak to post-distribution causes of action. *Hillman*, 2010 WL 7373701, *4, Pet. App. 44a-45a. Instead, the trial court found that only this Court's second holding regarding the anti-attachment provision prevents courts from enforcing post-distribution State equitable remedies in SGLI cases. *Id.*

SGLIA are also similar to those under FEGLIA," the Virginia Supreme Court "considered *Ridgway* to be 'highly persuasive, if not binding in construing FEGLIA.'" *Maretta*, 722 S.E.2d at 35, Pet. App. 9a (quoting *Zaldivar*, 413 F.3d at 120).

The flaw in the rationale of the Virginia Supreme Court and the other courts which have ruled similarly is that they do not attempt to determine Congress's purposes and objectives in enacting FEGLIA. They apply those behind SGLIA instead. However, "the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone*, 505 U.S. at 516. In an Indirect Conflict Preemption analysis in particular, the purposes of Congress must be examined in order to determine if State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79. The courts which apply *Ridgway* in FEGLI cases look at FEGLI's statutory order of precedence and the regulations related thereto in a vacuum. However, this is not the proper way to interpret the preemptive scope of FEGLIA, as it is not FEGLIA and SGLIA's similarities which control this analysis, it is their differences.

In the first part of the *Ridgway* opinion, this Court reviewed SGLIA's provisions, regulations,

and legislative history, and found that "[t]he obvious and stated concern of Congress was to provide coverage for the member, no matter how hazardous the duty, and thus protection for the member's designated beneficiaries." *Ridgway*, 454 U.S. at 53. Therefore, this Court determined that one of Congress's objectives was for SGLI proceeds to enjoy exceptional creditor protection in the hands of beneficiaries.

However, a review of FEGLIA's provisions, regulations and legislative history shows that Congress did not intend to give FEGLI proceeds the same creditor protection as SGLI proceeds. To the contrary, such a review shows that Congress intended for FEGLI proceeds to be treated like any other life insurance proceeds once they are in the recipient's hands. Even if Congress wanted Federal employees to have the ability to leave creditor protected funds to their intended beneficiaries, regardless of State law or the equities of the case, Congress certainly would not want to curtail the operation of a State law, such as VA. CODE § 20-111.1(D), which is designed to make sure that Federal employees' ***intended*** beneficiaries receive the insurance proceeds.

When this Court determined the preemptive reach of SGLIA's statutory order of precedence and

the regulations related thereto, it not only looked at SGLIA's legislative history (which is very different from that of FEGLIA's and is discussed below), but it looked at the entirety of SGLIA. In particular, when discerning Congress's purpose from SGLIA's language, this Court noted that "[t]he legislation itself says nothing about contrary dictates of state law or state judgments." *Ridgway*, 454 U.S. at 53. FEGLIA, on the other hand, contains contrary dictates with regard to state law and state judgments, by permitting a filed divorce order to control who receives insurance proceeds instead of the insured's beneficiary designation. 5 U.S.C. § 8705(e), App. 3a-5a. It also has an express preemption provision (5 U.S.C. § 8709(d)(1), App. 5a) and lacks an anti-attachment provision. Therefore, the entirety of the FEGLIA legislation itself, as well as its legislative history, should be examined to determine the purposes and objectives of Congress in enacting FEGLIA's statutory order of precedence.

Blindly following the precedent in *Ridgway* because FEGLIA has the same statutory order of precedence would make it impossible for Congress to enact a life insurance program designed to be convenient to administer but subject to post-distribution State equitable remedies, as a statutory order of precedence is required in any

well written insurance act. This Court stated in *Ridgway* that "[a] result of this kind, of course, may be avoided if Congress chooses to avoid it. . . . Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack or seizure . . . . That is Congress' choice. It remains effective until legislation providing otherwise is enacted." *Ridgway*, 454 U.S. at 63.

If Congress wanted to amend SGLIA to permit enforcement of post-distribution State laws, it would not change its statutory order of precedence. It would, however, have to delete the anti-attachment provision, 38 U.S.C. § 1970(g), App. 7a-8a. It may also enact an express preemption provision to clarify that it was only preempting pre-distribution State laws which impact the administrative convenience of the plan. Finally, it may even enable enforcement of State equitable remedies pre-distribution if such enforcement does not overly burden the administration of the plan. Notably, FEGLIA has an express preemption provision designed solely to preempt State laws to the extent they interfere with the convenient administration of FEGLI (5 U.S.C. § 8709(d)(1), App. 5a), lacks an anti-attachment provision and includes a mechanism for allowing State divorce orders to control beneficiary designations (5 U.S.C. § 8705(e), App. 3a-5a).

The point is, 5 U.S.C. § 8705(a), in and of itself, cannot be the sole grounds for determining that Congress intended for FEGLI proceeds to enjoy post-distribution creditor protection. Congress's objectives and purposes must be ascertained from an examination of the entire FEGLIA, its regulations and its legislative history. Courts should not simply take the purposes and objectives this Court garnered from a review of SGLIA's provisions, regulations and legislative history and then uncritically apply them to FEGLIA.

2. Exclusion of the anti-attachment provision from FEGLIA, when it was added to SGLIA, clearly reflects, if not compels, a finding that Congress intended to permit enforcement of post-distribution State equitable remedies.

Congress's decision to exclude an anti-attachment provision in FEGLIA, similar to the one in SGLIA, is a clear indication that Congress did not intend to make FEGLI proceeds protected from the recipients' creditors.

In 1970, Congress amended SGLIA to include an anti-attachment provision, 38 U.S.C. §

1970(g). Pub. L. 91-291, § 5, 84 Stat. 330. SGLIA's anti-attachment provision provides that SGLI proceeds "shall be exempt from taxation, shall be exempt from claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 1970(g), App 8a. As previously discussed, the *Ridgway* court determined, from a textual review of SGLIA and its regulations, that one of the primary objectives of SGLIA was "protection for the member's designated beneficiaries." *Ridgway*, 454 U.S., at 52-53. The anti-attachment clause is the clearest indication of this objective.

Courts which relied on *Ridgway* to find Indirect Conflict Preemption in FEGLI cases failed to examine what the absence of an anti-attachment provision indicates about Congress's objectives and purposes behind FEGLIA. Instead, they dismissed the lack of such a provision as irrelevant, and took any mention of its absence as an attack on the proposition that the first holding in *Ridgway* applied to post-distribution equitable remedies.[16]

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[16] *Maretta*, 722 S.E.2d at 37-38, Pet. App. 14a-16a. ("State courts distinguishing *Ridgway* also fail to acknowledge . . . that its holding based on SGLIA's antiattachment provision was a separate independent basis for the result"); *Christ*, 979 F.2d at 581 ("SGLIA unlike FEGLIA, contained an anti-attachment provision. . . . But that fact was a separate

However, these courts miss the importance of the missing provision. The absence of an anti-attachment provision in FEGLIA has nothing to do with whether the first holding in *Ridgway* applied to post-distribution equitable remedies. The significance of the lack of an anti-attachment provision in FEGLIA is that Congress acted purposefully to permit enforcement of post-distribution equitable remedies against FEGLI proceeds. By refusing to look to FEGLIA to determine Congress's intent, these courts erroneously have been using Congress's intent in enacting SGLIA as a substitute.

"[B]oth FEGLIA and SGLIA contain identical 'order of precedence' provisions." *Maretta*, 722 S.E.2d at 35, Pet. App. 9a. However, when Congress amended SGLIA in 1970 to include the anti-attachment provision, it specifically declined to amend FEGLIA in the same way. If Congress had intended to prevent all post-distribution equitable claims against beneficiaries, it would have treated FEGLI policies the same as SGLI policies by including an anti-attachment provision

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ground for holding that SGLIA preempted the divorce decree."); *McShan*, 577 F. Supp. at 169 ("In both *Wissner* and *Ridgway* the existence of an anti-attachment provision was an *independent* basis upon which the Supreme Court found preemption.").

in FEGLIA. *See Ridgway*, 454 U.S. at 63. However, Congress chose not to do so. Congress's inclusion of the anti-attachment provision in SGLIA coupled with Congress's omission of a similar provision in FEGLIA compels a finding that Congress acted purposefully to make FEGLI proceeds vulnerable to post-distribution State domestic relations causes of action.[17]

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[17] *Hardy v. Hardy*, 963 N.E.2d 470, 480 (Ind. 2012) ("Ultimately, the lack of an anti-attachment provision within the FEGLIA, the divergent purposes underscoring FEGLIA and SGLIA, and the 1998 amendment to section 8705 of FEGLIA compel us to conclude that *Ridgway* is not controlling here."); *McCord v. Spradling*, 830 So.2d 1188, 1197 (Miss. 2002) ("If Congress had desired to totally pre-empt all state law claims it would have included an anti-attachment provision to FEGLIA. *Ridgway* expressly stated that if Congress chose to avoid the result in that case, it could do so by enacting legislation which did not include an anti-attachment provision. That is precisely what Congress did when it enacted FEGLIA.") (quoting *Kidd v. Pritzel*, 821 S.W.2d 566, 571 (Mo. Ct. App. 1991); *Sedarous v. Sedarous*, 666 A.2d 1362, 1367 (N.J. Super. Ct. 1995) ("FEGLIA's lack of an anti-attachment provision is the critical factor justifying, if not indeed compelling, the conclusion that *Ridgway* does not govern the FEGLIA preemption issue."); *Fagan v. Chaisson*, 179 S.W.3d 35, 45 (Tex. App. 2005) ("the omission of an anti-attachment clause supports a conclusion that nothing in FEGLIA dictates the preemption of state law."); *See United States v. Bestfoods*, 524 U.S. 51, 62 (1998) ("against this venerable common-law backdrop, the congressional silence is audible"); *Elkins v. Moreno*, 435 U.S. 647, 666 (1978) (absence of a reference to an immigrant's intent to remain a citizen of a foreign country is "pregnant" when contrasted with other

3. The 1998 amendment to FEGLIA, which requires insurance proceeds to be paid in accordance with a properly filed divorce decree, coupled with the exclusion of such an amendment in SGLIA clearly shows, if not compels, a finding that Congress did *not* intend to preempt all State equitable remedies in FEGLI cases.

Congressional intent to allow post-distribution equitable remedies to apply to FEGLI proceeds is also apparent from the addition of 5 U.S.C. § 8705(e), App 3a-5a. Congress amended 5 U.S.C. § 8705 to include subsection (e) in 1998. Pub. L. No. 105–205, 112 Stat. 683 (1998). 5 U.S.C. § 8705(e) specifically permits terms of a divorce decree, court-approved property settlement agreement, etc. to prevail over and displace a Federal employee's beneficiary designation. Congress has not included a similar amendment in SGLIA. *Hardy*, 963 N.E.2d at 480. This amendment was clearly in response to the many

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provisions of a "comprehensive and complete" immigrant code); *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (congressional silence is evidence of congressional intent not to extend vicarious liability in an unusual manner under the Fair Housing Act of 1968.).

court cases (mainly Federal) which held that State divorce orders affecting FEGLI beneficiary designations were preempted.[18] Most courts holding that FEGLIA preempts State law relied on *Ridgway*, and many even quoted "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Ridgway*, 454 U.S. at 56 (quoting *Wissner v. Wissner*, 338 U.S. 665, 658 (1950)); for cases quoting *Ridgway see Maretta*, 722 S.E.2d at 36-37, Pet. App. 12a-13a; *Zaldivar*, 413 F.3d at 121; *Christ*, 979 F.2d at 580; *Potter*, 533 So.2d at 594; *Mercier*, 721 F. Supp. at 1127.

With 5 U.S.C. § 8705(e), Congress has spoken with force and clarity in directing that the proceeds of a FEGLI policy may belong to one other than the named beneficiary. Despite the undeniable fact that Congress set up a mechanism that, in certain circumstances, requires the proceeds from a FEGLI policy to be paid in accordance with a state domestic relations

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[18] *See Christ*, 979 F.2d at 576 (court order required insured to maintain children as beneficiaries of policy); *Potter*, 533 So.2d at 591 (court order required insured to maintain ex-wife as beneficiary of policy); *Dean*, 881 F.2d at 948 (court order required insured to maintain ex-wife as beneficiary of policy); *Mercier v. Mercier*, 721 F. Supp. 1124, 1125 (D. N.D. 1989); *McShan*, 577 F. Supp. at 166; *Knowles v. Metro. Life Ins. Co.*, 514 F. Supp. 515, 516 (N.D. Ga. 1981).

equitable remedy (i.e., a divorce order), the Supreme Court of Virginia found that "[j]ust as with SGLIA, Congress has spoken with force and clarity in directing that the FEGLI proceeds *belong to* the named beneficiary and no other." *Maretta*, 722 S.E.2d at 36-37, Pet. App. 12a-13a. This simply is not the case.

In determining the purposes and objectives of SGLIA, this Court specifically noted that "[t]he legislation itself says nothing about contrary dictates of state law or state judgments." On the other hand, the inclusion of 5 U.S.C. § 8705(e) in FEGLIA speaks volumes about Congress's intent to permit States to enforce their equitable remedies. It is in line with Congress's intent to keep the administration of FEGLI policies easy for OPM and MetLife while respecting States' interests. It also undeniably demonstrates that Congress did not intend to give Federal employees a right to freely designate and change a beneficiary of a FEGLI policy without restriction. Finally, the lack of such a provision in SGLIA establishes, if not compels, a finding that Congress intended to treat FEGLI policies and SGLI policies differently in this regard. *Hardy*, 963 N.E.2d at 480.

4. Congress indicated the preemptive scope of FEGLIA in 5 U.S.C. § 8709(d)(1), and a broader preemptive reach need not be inferred from FEGLIA's other provisions.

Congress indicated the preemptive reach of FEGLIA in 5 U.S.C. § 8709(d)(1), and a broader preemptive reach need not be inferred from FEGLIA's other provisions.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," - "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."

Cipollone, 505 U.S. at 517 (internal citations omitted).

5 U.S.C. § 8709(d)(1) is FEGLIA's express preemption provision. As discussed at length in Section III below, this provision does not expressly preempt VA. CODE § 20-111.1(D). Given that Congress has clearly indicted FEGLIA's preemptive reach with 5 U.S.C. § 8709(d)(1) and that such reach does not extend to VA. CODE § 20-111.1(D), a further reach should not be inferred from 5 U.S.C. § 8705(a). This is especially the case since VA. CODE § 20-111.1(D) is a State domestic relations equitable remedy. "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo*, 439 U.S. at 581 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)); *see also Mansell v. Mansell*, 490 U.S. 581, 587 (1989); *Rose v. Rose*, 481 U.S. 619, 625 (1987) (quoting *Wetmore*); *McCarty v. McCarty*, 453 U.S. 210, 236 (1981) (Rehnquist, J., dissenting) (superseded by statute) (quoting *Wetmore*). Therefore, it can be argued that express preemption is the only way Federal law may preempt State domestic relations laws.

Courts which have held that 5 U.S.C. § 8705(a) supersedes State equitable remedies under the theory of Indirect Conflict Preemption fail to appreciate that the existence of an express preemption provision creates a presumption against implied preemption. To the contrary, they find that 5 U.S.C. § 8709(d)(1) supports their holding of Indirect Conflict Preemption.[19] SGLIA does not contain an express preemption provision like 5 U.S.C. § 8709(d)(1) which limits its preemptive reach. Instead, it has the anti-attachment provision previously discussed, which is a much broader express preemption provision.

5. A comparison of the legislative histories of FEGLIA and SGLIA show the differing purposes behind the two Acts and compels a finding that *Ridgway* does not control FEGLI cases.

A textual reading of FEGLIA alone is more than sufficient to demonstrate that Congress did not have a clear and substantial objective of protecting FEGLI proceeds from the recipients'

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[19] *See Maretta*, 722 S.E.2d, at 37, n. 3, Pet. App. 13a; *Christ*, 979 F.2d at 579; *Potter*, 533 So.2d at 594; *Sullivan*, 96 F.3d at 20; *Metro. Life Ins. Co. v. Zaldivar*, 337 F. Supp. 2d 343, 347 (D. Mass. 2004), *aff'd* 413 F.3d 119 (1st Cir. 2005).

creditors, especially when its provisions are compared to that of SGLIA, an Act where this was an objective. Nevertheless, a review of the legislative history of FEGLIA, as compared to that of SGLIA, reinforces this conclusion.

In *Ridgway*, this Court reviewed the legislative history of SGLIA when determining that "[t]he obvious and stated concern of Congress was to provide coverage for the member, no matter how hazardous the duty, and *thus protection for the member's designated beneficiaries.*" *Ridgway*, 454 U.S. at 53 (emphasis added). Accordingly, this Court found Congressional desire for SGLI proceeds to enjoy post-distribution creditor protection. It noted the strong Federal interest behind such purposes and objectives:

> Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.

Id. at 56-57 (quoting *Wissner*, 338 U.S. at 660-661). This Court found that "[t]he impetus for the legislation was the escalating level of hostilities and casualties in the then ongoing Vietnam conflict; this had prompted private commercial insurers to restrict coverage for service members." *Id.* at 50 (citing 111 Cong. Rec. 24339 (1965) (remarks of Rep. Teague, Chairman of the House Committee on Veterans' Affairs) and S. Rep. No. 89-619, 3 (1965)).

Contrast this to the legislative history of the FEGLIA. As previously noted, President Eisenhower explained that the impetus behind FEGLIA was first, to better enable Federal employees to carry out their responsibilities to their families and second, to be part of an administratively convenient comprehensive benefits program which is in-line with (but not better than) the best practices of progressive private employers at the time. S. Rep. No. 83-1654, at 5 (1954), *as reprinted* in 1954 U.S.C.C.A.N. vol. 2 3056.

A specific look at the legislative history of FEGLIA's statutory order of precedence supports the conclusion that Congress intended FEGLIA to be such a plan and demonstrates its desire for such a plan to be administratively convenient. The

Senate clarified that it had two reasons for establishing FEGLIA's statutory order of precedence: 1) to avoid administrative difficulties; and 2) to avoid serious delays in paying insurance benefits to survivors.[20] "§ 8705 serves a valuable and worthwhile purpose by keeping the OPM and the insurance company out of legal entanglements." *Kidd*, 821 S.W.2d at 572.

However, nothing in the legislative history of 5 U.S.C. § 8705(a) remotely suggests that Congress intended to create a benefit for Federal employees that is on par with the exceptional benefit given to the brave men and women who defend our country.[21] Nothing else in FEGLIA's legislative history does either. To the contrary, all legislative history points to Congress establishing a group life insurance program in accordance with the objectives President Eisenhower outlined. *Kidd*, 821 S.W.2d at 569-570 (examining legislative

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[20] S. Rep. No. 89-1064, *reprinted in* 1966 U.S.C.C.A.N. 2070, 2071.

[21] *McCord*, 830 So.2d at 1196 ("Congress intended to clarify beneficiary status for the benefit of insurers, not give the beneficiary a federally guaranteed title to the funds."); *In re Estate of Anderson*, 195 Ill. App. 3d 644, 653 (1990) (In enacting 5 U.S.C. § 8705(a), Congress intended to alleviate difficulties experienced by the Civil Service Commission and the insurance companies. Congress did not intend to prevent suits against the payee of insurance after they have been paid the proceeds.).

history and subsequent amendments to 5 U.S.C. § 8705). Under such a plan, Federal employees receive the same type of benefit which private employees receive – not a better one. 1954 U.S.Code Cong. & Admin.News, Volume 2 at 3056. If FEGLIA did not do so "the FEGLI system [would separate] federal employees from regular corporate employees, which is exactly what FEGLI was created to prevent." *Bell Estate ex rel. Bell v. Bell*, No. 2007-CA-001050-MR, 2009 WL 350607, *4 (Ky. Ct. App. Feb. 13, 2009).

Accordingly, a comparison of the legislative histories of FEGLIA and SGLIA demonstrates that Congress wanted service members to enjoy the special benefits afforded SGLI proceeds, but did not intend to extend those benefits to civilian Federal employees. At a minimum, Congress has not expressed the required "clear and manifest" intent to give this same entitlement to civilian Federal employees.

6. VA. CODE § 20-111.1(D) furthers Federal interests by bestowing the benefit of FEGLI proceeds upon Federal employees' intended beneficiaries.

Even if this Court determines that Congress intended for FEGLI proceeds to belong to Federal employees' intended beneficiaries and none other, and that such proceeds be protected from such beneficiaries' creditors, 5 U.S.C. § 8705(a) still does not impliedly preempt VA. CODE § 20-111.1(D). The Federal government and the States share the same interest of having FEGLI proceeds go to Federal employees' intended beneficiaries. And as discussed at length in Section I(b) above, VA. CODE § 20-111.1(D) confers the benefit of FEGLI proceeds to Federal employees' intended beneficiaries (i.e., their families) as opposed to their unintended beneficiaries (i.e., their ex-spouses).

Ex-Wife characterizes VA. CODE § 20-111.1(D) as dictating who receives FEGLI proceeds against the will of Federal employees. This is incorrect. Under VA. CODE § 20-111.1(D), Federal employees at all times control the beneficiary designations of their FEGLI policies. VA. CODE § 20-111.1(D) does not in any way, shape or form restrict a Federal employees right to freely

"designate the beneficiary and to alter that choice at any time." *See Ridgway*, 454 U.S., at 56. It does not force an insured to designate or maintain the insured's family instead of an ex-spouse. It simply changes the default rule so that, absent a post-divorce indication to the contrary, FEGLI proceeds go to an insured's family instead of an ex-spouse. However, at all times, both before and after divorce, Federal employees are free to designate anyone they choose. If a Federal employee wants to designate an ex-spouse, he or she need only make a post-divorce beneficiary designation of the ex-spouse.

Assuming that Congress intended FEGLIA to protect beneficiaries of FEGLI proceeds from creditors, it seems unlikely, if not impossible, for VA. CODE § 20-111.1(D) to do major damage to this purpose when it too protects the interests of intended beneficiaries. Even when addressing the broad language of SGLI's anti-attachment provision in *Ridgway*, which strongly suggests that all post-distribution equitable remedies are preempted, this Court distinguished cases which permitted the imposition of constructive trusts over SGLI proceeds when such "was done to further the service member's dispositive intent." *Ridgway*, 454 U.S. at 61 n. 10 (citing *Burgess v. Murray*, 194 F.2d

131 (5th Cir. 1952) and *Voelkel v. Tohulka*, 141 NE.2d 344 (Ind. 1957)).

7. FEGLIA's regulations should not be interpreted as limiting post-distribution State laws.

FEGLIA's regulations should not be viewed as impliedly preempting post-distribution State laws. 5 C.F.R. § 870.802(f) provides that "[a]n insured individual (or an assignee) may change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted." 5 C.F.R. § 870.802(f), App. 5a. However, a divorce order filed in accordance with 5 U.S.C. § 8705(e) clearly restricts an insured's right to change a beneficiary. Therefore, this right is not absolute and State law can restrict it. Furthermore, OPM is of the opinion that post-distribution State law should be respected as long as it does not impact the administration of FEGLI policies. As such, OPM's regulations should be interpreted in accordance with its views on this subject. OPM's policy is evident from the Master Policy to which OPM and MetLife prepared, negotiated and agreed. FEGLIA's Master Policy expressly preempts State tax withholding laws, but also expressly permits post-distribution enforcement of State tax laws.

Master Policy, Sec. 5(C), SG Lodg. 20 ("[N]othing herein shall be construed to relieve any person who receives the payment of the amount of Life Insurance . . . under this Section or the order of precedence set forth in Section 11 from compliance with any tax law of any State."). Even if OPM did intend for 5 C.F.R. § 870.802(f) to go beyond merely administrative convenience purposes and preempt post-distribution State laws, such intentions would be inconsistent with Congress's unmistakable intent to respect such State laws, and should therefore not be followed. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-13 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

b. VA. CODE § 20-111.1(D) Does Not Directly Conflict With Either 5 U.S.C. § 8705(a) Or 5 C.F.R. § 870.802(f).

Direct Conflict Preemption occurs when a State law directly conflicts with a Federal law so that both laws cannot fully be complied with. *English*, 496 U.S. at 79. Direct Conflict Preemption is not applicable in this case. There is only one provision of the FEGLIA in question - 5 U.S.C. § 8705(a) - which provides the statutory order of precedence for the payment for FEGLI benefits. 5 U.S.C. § 8705(a), App. 1a-3a. Additionally, Federal regulations state that "[a]n

insured individual (or an assignee) may change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted." 5 C.F.R. § 870.802(f), App. 5a.

VA. CODE § 20-111.1(D) does not directly conflict with 5 U.S.C. § 8705(a) or 5 C.F.R. § 870.802(f). It does not affect a beneficiary designation at all.[22] VA. CODE § 20-111.1(D) merely creates a post-distribution cause of action against the recipient. These Federal laws and VA. CODE § 20-111.1(D) work harmoniously together. Insurance proceeds are paid out in accordance with the insured's beneficiary designation and thereafter the recipient is sued so as to confer the benefits of the insurance upon the Federal employee's intended beneficiary. It is hard to imagine a less intrusive law. Neither OPM nor MetLife is a party to, has an interest in, or is affected by litigation. No representative of OPM or

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[22] *Kidd*, 821 S.W.2d at 571-572 ("The imposition of a constructive trust does not interfere with § 8705 or who holds legal title to the FEGLIA proceeds."); *Barden v. Metro. Life Ins. Co.*, 41 N.C. App. 135, 138 (1979) ("[c]ompliance with the procedure set out in § 8705(a) does not as a matter of law automatically entitle the person so designated to the proceeds."); *Roberts v. Roberts*, 560 S.W.2d 438, 440 (Tex. Civ. App. 1977) ("The judgment of the trial court did not in any manner change, alter, or affect the designated beneficiary of the policy.").

MetLife is required to act or to refrain from acting. Nothing in VA. CODE § 20-111.1(D) in any way changes or affects the rights or duties of OPM or MetLife from the very inception of a Federal employee's insurance plan to the payment of the death benefit.

Furthermore, VA. CODE § 20-111.1(D) does not directly touch FEGLI proceeds at all. A strict reading of the language only makes "the former spouse . . . personally liable for the *amount* of the payment." VA. CODE § 20-111.1(D) (emphasis added). FEGLI proceeds are used solely as a measure of damages, and VA. CODE § 20-111.1(D) just makes the widow(er) etc. a general creditor of an ex-spouse. Assuming FEGLI proceeds are protected from creditors in the hands of the recipient (as SGLI proceeds are), a State law judgment obtained against an ex-spouse would not be collectible unless the ex-spouse has other non-creditor protected assets available to satisfy the judgment. This is that same as a bank being unable to collect directly on SGLI proceeds if it obtained a judgment related to a foreclosure shortfall against the insurance recipient. However, the judgment itself is not invalid or preempted, just uncollectable against SGLI proceeds.

III. 5 U.S.C. § 8709(d)(1) DOES NOT EXPRESSLY PREEMPT VA. CODE § 20-111.1(D).

5 U.S.C. § 8709(d)(1) does not expressly preempt VA. CODE § 20-111.1(D). Express preemption occurs when Congress, through direct legislative enactment, "define[s] explicitly the extent to which its enactments pre-empt state law. . . . Pre-emption fundamentally is a question of congressional intent" and, when possible, courts should determine Congressional preemptive intent from the text of an express preemption provisions. *English*, 496 U.S. at 78-79 (internal citations omitted). 5 U.S.C. § 8709(d)(1), FEGLIA's express preemption provision, provides:

> (d)(1) The ***provisions of any contract under this chapter*** which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which ***relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.***

5 U.S.C. § 8709(d)(1), App. 5a (emphasis added). There are three phrases crucial to the interpretation of this provision, all of which support the conclusion that FEGLIA does not expressly preempt VA. CODE § 20-111.1(D): i) "provisions of any contract under this chapter"; ii) "to the extent that the law or regulation is inconsistent with the contractual provisions"; and iii) "relates to group life insurance." *Id.* A review of this text establishes that 5 U.S.C. § 8709(d)(1) only applies to FEGLI's Master Policy. Accordingly, 5 U.S.C. § 8709(d)(1) does not expressly preempt VA. CODE § 20-111.1(D) because VA. CODE § 20-111.1(D) does not both: 1) conflict with any provisions of the Master Policy; ***and*** 2) relate to group life insurance plans. This is discussed in more detail below.

a. 5 U.S.C. § 8709(d)(1) Only Applies To Provisions Of FEGLI's Master Policy And, Therefore, Its Preemptive Reach Must Be Construed Modestly.

5 U.S.C. § 8709(d)(1) specifically states that it only applies to "provisions of any *contract* under this chapter." *Id.* (emphasis added). It "renders preemptive contract terms . . ., not provisions

enacted by Congress."[23] In this case, the "contract" is the Master Policy entered into between OPM and MetLife to administer the FEGLI program. Accordingly, by its express terms, 5 U.S.C. § 8709(d)(1) does not apply to 5 U.S.C. § 8705(a), any other section of FEGLIA or any federal regulations promulgated thereunder.

The preemptive scope of provisions of the Master Policy must be viewed narrowly, as "terms of an OPM-[MetLife] negotiated contract" (as opposed to a Federal law), which purports to preempt State law, deserves a "modest reading." *McVeigh*, 547 U.S. at 698. This is especially the case when the State law purported to be superseded regulates domestic relations. *See Cipollone*, 505 U.S. at 523.

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[23] *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006) (discussing the almost identical statute contained in 5 U.S.C. § 8902(m)(1) of the Federal Employees Health Benefits Act of 1959 (FEHBA)); *Hillman*, 2010 WL 7373701, *7 ("This clause thus expressly preempts any state law that is inconsistent with the FEGLI master policy."); *Christ*, 979 F.2d at 579 ("This clause broadly preempts any state law that is inconsistent with the FEGLIA master policy."); *Fernbaugh v. Metro. Life Ins. Co.*, CV-06-1361, 2006 U.S. Dist. LEXIS 67765 (M.D. Pa. Sept. 21, 2006) ("FEGLIA's clause preempts state laws inconsistent with the terms of a FEGLI Policy while the ERISA clause preempts state law that conflicts with any of its statutory sections.").

At trial, Ex-Wife failed to enter into evidence any provision of FEGLI's Master Policy, and neither Ex-Wife nor the Supreme Court of Virginia seemed aware of its existence. *See Maretta*, 722 S.E.2d at 33, n. 1, Pet. App. 3a. (With the absence of FEGLI's Master Policy in evidence, the Virginia Supreme Court mistakenly states that "[t]he 'contractual provisions' referenced in 5 U.S.C. § 8709(d)(1) with which state law must be consistent are simply the provisions of the FEGLIA."). Thus, Ex-Wife cannot properly contend that any such provision preempts VA. CODE § 20-111.1(D) as no such provision is in the record in this case.

The United States Solicitor General sought leave to lodge a copy of FEGLIA's Master Policy with this Court on December 14, 2012. Br. of United States as amicus curiae 22 n. 4. Therefore, if this Court chooses to take judicial notice of this non-record material,[24] only Sections 5 and 11 are relevant here.

Section 5(A) of the Master Policy provides that upon the death of an insured Federal employee, MetLife shall pay the death benefit to such employee's designated beneficiary, or if none, in accordance with the order of precedence provided

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[24] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 278 n. 5 (1986) (Lodged materials are not part of the record.).

for in Section 11 of the Master Policy.[25] Section 11 of the Master Policy provides, among other things, for an order of precedence in which the death benefit should be paid absent a valid beneficiary designation. Master Policy, Sec. 11, SG Lodg. 25. Section 11's order of precedence is the same one provided for in 5 U.S.C. § 8705(a) (i.e., first to widow(er), then to children, etc.). *Id.* Section 11 also states that "[a]ny Employee insured hereunder may designate a Beneficiary and may, from time to time, change his designation of beneficiary, only by filing written notice thereof, with his employing office. . . and that [c]onsent of the Beneficiary shall not be requisite to any change of beneficiary." *Id.* However, it is important to note that it does not

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[25] Section 5(A) of the Master Policy provides, in relevant part:

> Upon receipt by the Office of satisfactory proof, in writing, that any Employee shall have died while insured hereunder, the Office shall pay, subject to the terms hereof, the amount of Life Insurance, in any (plus interest, if any, as determined by the Insurance Company) in force hereunder on account of such Employee . . . at the date of his death. Payment shall be made to the Beneficiary of record of the Employee or otherwise as provided in Section 11 hereof immediately after receipt of such proof and of proof that the claimant is entitled to such payment.

Master Policy, Sec. 5(A), SG Lodg. 18.

contain any provision similar to 5 C.F.R. § 870.802(f), which states that these rights cannot be waived or restricted. *See* 5 C.F.R. § 870.802(f), App. 5a.

b. 5 U.S.C. § 8709(d)(1) Only Applies To The Extent That State Law Is Inconsistent With The Provisions Of FEGLI's Master Policy.

By its express terms, State law must actually conflict with the operation of a provision of the Master Policy before preemption occurs. 5 U.S.C. § 8709(d)(1), App. 5a. FEGLI's Master Policy preempts State law only "to the extent that the law or regulation is inconsistent with the contractual provisions" of FEGLI's Master Policy. ERISA's preemption provision does not have this limiting language and is therefore broader in scope than FEGLIA's. *See McVeigh*, 547 U.S. at 686 (discussing the effect of the removal of that phrase from FEHBA's express preemption provision).

VA. CODE § 20-111.1(D) does not conflict with any provision of the Master Policy. Under Sections 5(A) and 11 of the Master Policy, FEGLI proceeds are paid out to the designated beneficiary. Thereafter, the State law equitable remedy contained in VA. CODE § 20-111.1(D) creates a post-

distribution cause of action against an ex-spouse recipient when certain conditions are met. The Master Policy and VA. CODE § 20-111.1(D) dovetail together and have the same ultimate objective – getting insurance proceeds to an insured's intended beneficiary. This limiting clause alone is sufficient to establish that the State law should stand. However, this conclusion is greatly reinforced when coupled with the facts: i) that the preemptive reach of Master Policy provisions should be construed modestly; and ii) that the threatened State law in question is a domestic relations law.

c. 5 U.S.C. § 8709(d)(1) Only Applies To State Laws Which "Relate To" Group Life Insurance.

It is also apparent from the text of 5 U.S.C. § 8709(d)(1) that the terms of the Master Policy only preempt State laws "which relate to group life insurance." 5 U.S.C. § 8709(d)(1), App. 5a. While the Court has not had the opportunity to interpret this phrase with regard to FEGLIA, it has repeatedly done so with regard to the similar express preemption provision in ERISA.[26]

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[26] ERISA's preemption provision provides, in relevant part, that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under

However, this Court has on more than one occasion referred to the term "relate to" as "unhelpful text" when trying to interpret the intent of Congress. *Dillingham*, 519 U.S. at 324 (quoting *Travelers*, 514 U.S. at 656).

While this Court has recognized that it is "'clearly expansive' . . ., the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy,' or else 'for all practical purposes preemption would never run its course.'" *Egelhoff*, 532 U.S. at 146 (quoting *Travelers*, 514 U.S. at 655). Therefore, this Court has established a two-part test to determine if a State law relates to an ERISA plan. *Dillingham*, 519 U.S. at 324-325; *Egelhoff*, 532 U.S. at 147. Under this test, a State law "relates to an ERISA plan" if it either: i) references the plan; or ii) has an impermissible connection with the plan. *Dillingham*, 519 U.S. at 324-325; *Egelhoff*, 532 U.S. at 147.

A State law references an ERISA plan if it "acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation." *Dillingham*, 519 U.S. at 325. Applying this rule to FEGLIA, VA. CODE § 20-111.1(D) does not reference group life

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section 1003(b) of this title." 29 U.S.C. § 1144(a) (emphasis added).

insurance plans. VA. CODE § 20-111.1(D) affects all non-probate assets, not exclusively group life insurance benefits, and it would continue to operate with regard to other types of non-probate assets if group life insurance ceased to exist.

Determining if State law relates to ERISA under the impermissible connection arm of this test is more complicated. To make such a determination, this Court "look[s] both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as the nature of the effect of the state law on ERISA plans." *Egelhoff*, 532 U.S. at 147 (quoting *Dillingham*, 519 U.S., at 325). Applying this forbidden connection test to FEGLIA, VA. CODE § 20-111.1(D) does not "relate to group life insurance" either.

As discussed several times herein, VA. CODE § 20-111.1(D) is in-line with the objectives of Congress in enacting FEGLIA. A look at the specific legislative history behind 5 U.S.C. § 8709(d)(1) reinforces this conclusion. The House Report regarding 5 U.S.C. § 8709(d)(1) explains that this provision of FEGLIA was enacted "to eliminate all possibility of a conflict between Sections 7 and 8 of this Bill, increasing levels of optional group life insurance available to

employees, and any provision of state law limiting the amount of insurance which may be provided under a group insurance contract to citizens of the state." H.R. Rep. No. 96-120, 1980 U.S.C.C.A.N. 3867. 5 U.S.C. § 8709(d)(1) "is only concerned with conflicts between state regulation of group life insurance programs and the express contractual provisions contained in FEGLIA policies. This section is not concerned with state law claims brought once the proceeds of a policy are paid out." *McCord*, 830 So.2d at 1198 (citation omitted); *Kidd*, 821 S.W.2d at 573 ("It must be assumed that Congress was merely clarifying its intent to relieve administrative difficulties when a conflict arose between state insurance regulations pertaining to group life insurance programs and the expressed contractual provisions of FEGLIA policies."); *Sedarous*, 666 A.2d at 1366.

Furthermore, the Master Policy itself only expressly preempts State law which impacts the FEGLI plan pre-distribution and expressly permits post-distribution State claims against FEGLI proceeds in the hands of the recipient. Section 5(C) of the Master Policy is the only Section of the Master Policy which expressly preempts State law. Master Policy, Sec. 5(C), SG Lodg. 20. Section 5(C) states:

> (C) Payment of the amount of Life Insurance . . . to any person entitled thereto under subsections (A) and (B) of this Section or the order of precedence set forth in Section 11 shall be made without regards [*sic*] to any State law relating to the collection of taxes by any State. . . . Payment of the amount of Life insurance . . . to any person entitled thereto under this Section or the order of precedence set forth in Section 11 shall in no event subject the Office to any liability under any tax law of any State. Not withstanding [*sic*] the above, nothing herein shall be construed to relieve any person who receives the payment of the amount of Life Insurance . . . under this Section or the order of precedence set forth in Section 11 from compliance with any tax law of any State.

Id. Section 5(C) relieves MetLife of the administrative burden of determining and complying with various States' withholding laws. The requirement that "any person who receives the payment of the amount of Life Insurance" is subject to State tax law, expressly permits post-distribution garnishment proceedings against the

insurance proceeds in the hands of the recipient.[27] OPM and MetLife understood that Congress intended this preemption power solely for administrative convenience purposes and not to supplant the effects of inconsistent State laws. In particular OPM and MetLife crafted the Master Policy to permit the recipient of insurance proceeds to be subject to post-distribution State laws, at least as it relates to State tax law.[28]

The other part of the analysis in determining if VA. CODE § 20-111.1(D) has an impermissible connection with group life insurance, "is the nature of the effect of the state law on" group life insurance and specifically the FEGLI program.

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[27] *See, e.g.*, KAN. STAT. ANN. § 60-731 (2010); NEB. REV. STAT. § 25-1558 (2012); NEV. REV. STAT. § 21.090 (2011); *see also* Alan C. Myers, Note, *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment*, 66 Wash. & Lee L. Rev. 371, 375-379, 385-89 (2009).

[28] Furthermore, VA. CODE § 20-111.1(D) is arguably a State tax law. As such, the Master Policy expressly permits the application of VA. CODE § 20-111.1(D). Funds received under VA. CODE § 20-111.1(D) may be subject to income taxation as a payment received under a cause of action for unjust enrichment. *See* 26 U.S.C.A. §§ 61 and 104 (2012); *see also* Internal Revenue Service Publication 525 at 54. Whereas life insurance death benefits generally are excluded from taxable income. 26 U.S.C.A. § 101 (2012). Therefore, the application of VA. CODE § 20-111.1(D) may create a taxable event which benefits the State (as well as the Federal government).

Egelhoff, 532 U.S. at 147. Of course, VA. CODE § 20-111.1(D) has no effect on the FEGLI program or any other group life insurance plan. It works entirely outside of OPM and MetLife's involvement. Under the Master Policy, FEGLI proceeds are paid out in accordance with the order of precedence, at which point, neither OPM nor MetLife has any further involvement. Thereafter, VA. CODE § 20-111.1(D), becomes operative to further Virginia's (and the Federal government's) important interests of getting the benefit of FEGLI insurance to Federal employees' intended beneficiaries.

Since Congress's stated intent in enacting 5 U.S.C. § 8709(d)(1) was to alleviate inconveniences for OPM and MetLife in the administration of FEGLI policies, and since VA. CODE § 20-111.1(D) does not have an effect on the administration of FEGLI policies or any other group life insurance, VA. CODE § 20-111.1(D) does not have an impermissible connection to group life insurance. While this is abundantly clear in and of itself, it should be incontrovertible given that: i) the scope of 5 U.S.C. § 8709(d)(1) is to be read modestly as it is dealing with the preemptive power of contract provisions; and ii) there is such a strong presumption against preemption of State domestic relations laws.

Because VA. CODE § 20-111.1(D) does not reference or have a forbidden connection with group life insurance, it does not relate to group life insurance within the meaning of 5 U.S.C. § 8709(d)(1). As such, 5 U.S.C. § 8709(d)(1) does not expressly preempt VA. CODE § 20-111.1(D).

IV. THIS COURT SHOULD ADOPT A BRIGHT-LINE RULE.

This Court has recognized the value of adopting bright-line preemption rules. *Egelhoff*, 532 U.S. at 148; *Kennedy*, 555 U.S. at 300-301. This case presents this Court with an opportunity to do so for FEGLI policies in a logical clear and fair manner, while respecting the interests of both the Federal government and States. A rule that preempts pre-distribution State equitable remedies, other than those specifically permitted under FEGLIA (i.e., 5 U.S.C. § 8705(e)), while allowing enforcement of post-distribution State laws accomplishes just that.

Under such a rule, OPM and MetLife would enjoy "simple administration, avoiding double liability, and ensuring the beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." *Kennedy*, 555 U.S. at 301 (quoting citation omitted). At the same time,

States could exercise their historic police powers regulating divorce and other matters that are best left to the States. Federal employees would enjoy the protections of laws such as VA. CODE § 20-111.1(D) and enforcement of spousal waivers, while being prevented from defrauding their children, ex-spouses and State courts.[29] Furthermore, such an uncomplicated rule "forecloses any justification for enquires into nice expressions of intent," *Kennedy*, 555 U.S. at 301, or fraud, slayer statutes issues, or any other matters which could affect the beneficial enjoyment of the insurance proceeds. All such matters could be dealt with by the States after the proceeds are paid out.

---

[29] While the facts in this case deal with VA. CODE § 20-111.1(D), the outcome of this case will likely impact other State laws. For example, *Ridgway* dealt with a divorce order requiring the insured to maintain children as beneficiaries of an insurance policy to insure against the loss of child support. 454 U.S. at 48. *Wissner* dealt with enforcement of community property rights. 338 U.S. at 657-58. *Kennedy* dealt with a waiver of rights to an insurance policy. 555 U.S. at 290.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully, submitted.

DANIEL H. RUTTENBERG
Counsel of Record
ALAN B. PLEVY
KYUNG N. DICKERSON
BRET D. LEE
SMOLENPLEVY
8045 Leesburg Pike, Fifth Floor
Vienna, VA 22182
dhruttenberg@smolenplevy.com
(703) 790-1900

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APPENDIX

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The relevant provisions of FEGLIA are as follows:

5 U.S.C. § 8705 (2012) provides, in relevant part:

> (a) Except as provided in subsection (e), the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be

paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:

> First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office or, if insured because of receipt of annuity or of benefits under subchapter I of chapter 81 of this title as provided by section 8706(b) of this title, in the Office of Personnel Management. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.
>
> Second, if there is no designated beneficiary, to the widow or widower of the employee.
>
> Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.

Fourth, if none of the above, to the parents of the employee or the survivor of them.

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of the employee.

Sixth, if none of the above, to other next of kin of the employee entitled under the laws of the domicile of the employee at the date of his death.

(b) If, within 1 year after the death of the employee, no claim for payment has been filed by a person entitled under the order of precedence named by subsection (a) of this section, or if payment to the person within that period is prohibited by Federal statute or regulation, payment may be made in the order of precedence as if the person had predeceased the employee, and the payment bars recovery by any other person.

. . .

(e)(1) Any amount which would otherwise be paid to a person determined

under the order of precedence named by subsection (a) shall be paid (in whole or in part) by the Office to another person if and to the extent expressly pro-vided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.

(2) For purposes of this subsection, a decree, order, or agreement referred to in paragraph (1) shall not be effective unless it is received, before the date of the covered employee's death, by the employing agency or, if the employee has separated from service, by the Office.

(3) A designation under this subsection with respect to any person may not be changed except--

(A) with the written consent of such person, if received as described in paragraph (2); or

(B) by modification of the decree, order, or agreement, as the

case may be, if received as described in paragraph (2).

5 U.S.C. § 8709(d)(1) (2012) provides:

(d)(1) The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

The relevant provision of the Federal regulations promulgated under FEGLIA is as follows:

5 C.F.R. § 870.802(f) (2012) provides:

(f) An insured individual (or an assignee) may change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted.

The relevant provisions of SGLIA are as follows:

38 U.S.C. § 1970 (2012) provides, in relevant part:

> (a) Any amount of insurance under this subchapter in force on any member or former member on the date of the insured's death shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date of the insured's death, in the following order of precedence:
>
> > First, to the beneficiary or beneficiaries as the member or former member may have designated by a writing received prior to death (1) in the uniformed services if insured under Servicemembers' Group Life Insurance, or (2) in the administrative office established under section 1966(b) of this title if separated or released from service, or if assigned to the Retired Reserve, and insured under Servicemembers' Group Life Insurance, or if insured under Veterans' Group Life Insurance;

Second, if there be no such beneficiary, to the widow or widower of such member or former member;

Third, if none of the above, to the child or children of such member or former member and descendants of deceased children by representation;

Fourth, if none of the above, to the parents of such member or former member or the survivor of them;

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such member or former member;

Sixth, if none of the above, to other next of kin of such member or former member entitled under the laws of domicile of such member or former member at the time of the insured's death.

. . . .

(g) Any payments due or to become due under Servicemembers' Group Life

> Insurance or Veterans' Group Life Insurance made to, or on account of, an insured or a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to (1) collection of amounts not deducted from the member's pay, or collected from him by the Secretary concerned under section 1969(a) of this title, (2) levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.) (relating to the seizure of property for collection of taxes), and (3) the taxation of any property purchased in part or wholly out of such payments.

The relevant section of the Federal regulations promulgated under SGLIA is as follows:

38 C.F.R. § 9.4 (2012) provides:

> Any designation of beneficiary or election of settlement options is subject to

the provisions of 38 U.S.C. 1970 and 1977 and the following provisions:

(a) Any designation of beneficiary or settlement option election made by any member insured under Servicemembers' Group Life Insurance for full-time coverage or part-time coverage will remain in effect until properly changed by the member or canceled automatically for any of the following reasons:

(1) The insurance terminates following separation or release from all duty in a uniformed service.

(2) The member enters on duty in another uniformed service.

(3) The member reenters on duty in the same uniformed service more than 1 calendar day after separation or release from all duty in that uniformed service.

(b) A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary.

(c) Until and unless otherwise changed, a beneficiary designation and settlement option election of record on the

date a statutory increase in coverage takes effect shall be considered to be a beneficiary and optional settlement election for the increased amount as well, and any beneficiary named therein shall be entitled to the same percentage (%) share of the new total coverage amount as that beneficiary was entitled to prior to the statutory increase in coverage.

VA. CODE ANN. § 20-111.1 (2009) (amended 2012) provides:

A. Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent. The payor of any death benefit shall be discharged from all liability upon payment in accordance with the terms of the contract providing for the

death benefit, unless the payor receives written notice of a revocation under this section prior to payment.

B. The term "death benefit" includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit.

C. This section shall not apply (i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contrary result as to specific death benefits, or (ii) to any trust or any death benefit payable to or under any trust.

D. If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

UNIF. PROBATE CODE § 2-804 (amended 2010) provides, in relevant part:

> (b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a Court Order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:
>
> (1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse,
>
> . . .
>
> (h) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]
>
> (2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a

former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 11-1221

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JACQUELINE HILLMAN, PETITIONER

v.

JUDY A. MARETTA, RESPONDENT

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT

GENE C. SCHAERR
STEFFEN N. JOHNSON
ELIZABETH P. PAPEZ
EIMERIC REIG-PLESSIS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

GEORGE O. PETERSON
Counsel of Record
TANIA M. L. SAYLOR
Peterson Saylor, PLC
10555 Main Street
Suite 320
Fairfax, VA 22030
(703) 225-3620
gpeterson@
petersonsaylor.com

LINDA T. COBERLY
WILLIAM P. FERRANTI
BENJAMIN L. ELLISON
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

The Federal Employees' Group Life Insurance Act of 1954, 5 U.S.C. §§ 8701-8716 ("FEGLIA"), and its implementing regulations require that FEGLI benefits "shall be paid" to the beneficiary properly designated by the insured, 5 U.S.C. §8705(a), and further specify that the "right" of the insured to designate that beneficiary at any time cannot be waived or restricted, 5 C.F.R. §870.802(f). It is undisputed that FEGLIA preempts state laws, such as Virginia Code §20-111.1(A), that purport to revoke automatically upon divorce an insured's designation of his or her spouse as beneficiary of a life insurance policy.

Virginia Code §20-111.1(D) provides that, if Section 20-111.1(A)'s revocation-upon-divorce provision "is preempted by federal law," and the insured's former spouse receives a death-benefit payment to which another person would have been entitled if Section 20.111(A) had "not [been] preempted," then the former spouse is "personally liable" to that other person "for the amount of the payment."

The question presented is whether any provision of FEGLIA or its implementing regulations preempts Section 20-111.1(D)'s authorization of a state-law cause of action against a federal employee's designated beneficiary to obtain the benefits that FEGLIA required to be paid to such designated beneficiary.

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OPM, *Federal Employees' Group Life Insurance (FEGLI) Program Handbook* (2008), http://www.opm.gov/healthcare-insurance/life-insurance/reference-materials/handbook.pdf 18, 46

S. Rep. No. 95-903 (1978) 38

S. Rep. No. 83-1654 (1954) 51

Webster's Third New Int'l Dictionary of the English Language (1961) 36, 57

INTRODUCTION

This is a dispute between the widow and the former wife of a deceased federal employee, Warren Hillman, over benefits from Warren's federal life insurance policy. Warren's widow (petitioner) lays claim based on Virginia law, but Warren designated his former wife (respondent) to receive those benefits. Federal law gave him that right, and provided that it cannot be restricted. Accordingly, the Supremacy Clause will not countenance state law redirecting those benefits to someone else, dollar for dollar—let alone under a statutory provision expressly crafted to undo the effect of preemption.

The governing statute is the Federal Employees' Group Life Insurance Act of 1954, 5 U.S.C. §§ 8701-8716 ("FEGLIA"), but two other federal life insurance programs are pertinent: the National Service Life Insurance Act of 1940 ("NSLIA") and the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"). In all three programs, Congress specifically gave insureds the substantive right to provide their policy proceeds to a designated beneficiary. What is more, except insofar as FEGLIA actually goes *further* than SGLIA in protecting this right, the pertinent provisions in SGLIA and FEGLIA are materially identical.

Accordingly, the Court's assessment of this case should begin—and, we submit, end—with *Wissner* v. *Wissner*, 338 U.S. 655 (1950), and *Ridgway* v. *Ridgway*, 454 U.S. 46 (1981). In *Wissner*—a dispute between a service member's designated beneficiaries (his parents, claiming under NSLIA) and his widow (claiming under state community property law)—the Court held that state law was preempted. Similarly in *Ridgway*—a dispute between a service member's

second wife (claiming under SGLIA's statutory order of precedence) and his children (claiming under the service member's divorce decree)—the Court held that *Wissner* was controlling: "Here, as [in *Wissner*], it appropriately may be said: 'Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.'" 454 U.S. at 56 (quoting *Wissner*, 338 U.S. at 658).

FEGLIA creates the same right for ordinary federal employees. In fact, it was passed just four years after *Wissner*, and its beneficiary-designation provisions are almost word for word identical to those considered in *Ridgway*. Thus, FEGLIA must be given the same preemptive effect as NSLIA and SGLIA.

Indeed, it is undisputed that FEGLIA preempts Virginia Code §20-111.1(A), which upon an insured's divorce purports to revoke the insured's designation of his spouse as beneficiary of his life insurance policy. Yet Virginia seeks to accomplish this same result by further providing that, if Section A "is preempted by federal law," then the insured's designated beneficiary is "personally liable" to her former husband's widow for the precise amount of FEGLI proceeds she lawfully received. *Id.* §20-111(D). As the Virginia Supreme Court recognized, Section D, no less than Section A, conflicts with FEGLIA and is therefore "without effect." Pet. 5a (quoting *Altria Group, Inc.* v. *Good*, 555 U.S. 70, 76 (2008)).

That conclusion accords not only with precedent, but with the text, structure, history, and purpose of FEGLIA. Moreover, it best serves the interest of federal employees in designating beneficiaries of their life insurance without state-law interference—an interest reflected in FEGLIA's implementing regula-

tions. As those regulations provide, the insured has a right to change her beneficiary "at any time without the knowledge or consent of the previous beneficiary," and "[t]his right cannot be waived or restricted." 5 C.F.R. §870.802(f).

Petitioner acknowledges Congress's "strong interest in seeing that FEGLI proceeds are received by Federal employees' intended beneficiaries." Br. 10. She thus tries to distinguish between federal employees' *intended* beneficiaries and their *designated* beneficiaries, maintaining that "most divorced individuals want their assets to be inherited by family members instead of ex-spouses." Br. 21. But even if that is true for some—and Section D makes no allowance for a contrary intent—federal law has clear and precise provisions for making and changing beneficiaries, and it insists on paying the insured's properly designated beneficiary.

Virginia's regime thus runs into two difficulties. *First*, Section D "changes the default rule" (Br. 53)—and conflicting state law means, no less than conflicting ends, are preempted. *E.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 379-380 (2000). *Second*, Warren knew the federal rules, and those rules must inform how his intent is assessed. Whatever common sense supports the position that many people do not intend to give money to their former spouses, it is trumped by the federal rules governing intent. Warren, like all FEGLI insureds, was told that his designation would govern, and that a divorce would not change that designation. Thus, his inaction must be understood as reflecting his intent that Maretta receive the benefits of his policy. Virginia's default rule is inconsistent with federal law. It is therefore preempted.

STATEMENT

A. FEGLIA was neither Congress's first life insurance legislation, nor its last.

1. NSLIA and *Wissner*

In 1940, Congress enacted NSLIA to provide life insurance benefits to members and veterans of the armed forces. 54 Stat. 1008, codified as amended at 38 U.S.C. §801 *et seq.* (1946). NSLIA provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary." 38 U.S.C. §802(g). It also included an anti-attachment provision: Payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* §816.

In 1950, in *Wissner*, this Court addressed the preemptive effect of these provisions in a dispute between the parents and widow of a deceased Army major. Major Wissner had named his parents as his policy beneficiaries, but a state court held that his widow was entitled to half of the policy's proceeds under state community property law. 338 U.S. at 656-658. This Court reversed. First, referring to the beneficiary-designation provision (§802(g)) as the "controlling section of the Act," the Court explained:

> Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other. * * * [Wissner] chose his mother. It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the

> beneficiary Congress directed shall receive the insurance money.

Id. at 658-659. Second, the Court held that NSLIA's anti-attachment provision independently precluded diverting *future* payments under the policy (the proceeds of which were being paid in monthly installments). *Id.* at 659.

2. SGLIA and *Ridgway*

In 1965, Congress passed SGLIA as a replacement for NSLIA. The earlier statute "had been allowed to lapse * * * when commercial insurance generally became available to service members," but "the escalating level" of "casualties" in Vietnam "prompted private commercial insurers to restrict coverage for service members"—leading Congress to enact SGLIA. *Ridgway*, 454 U.S. at 50-51.

Much like NSLIA, SGLIA mandated payment of policy proceeds to such "beneficiar[y] as the member * * * may have designated by [an appropriately filed] writing received prior to death." 38 U.S.C. §770(a) (1976). Absent such a designation, proceeds would go to the service member's widow or widower, or if none then to children, grandchildren, parents, and the representative of the insured's estate. *Ibid.* In 1970, Congress added an anti-attachment provision. *Ridgway*, 454 U.S. at 52.

This Court considered the preemptive effect of these provisions in *Ridgway*. In contravention of a state divorce judgment expressly ordering him to maintain his life insurance for the benefit of his children, Sergeant Ridgway remarried and changed his beneficiary designation to provide that its proceeds be paid as specified "by law." Under

§770(a), that designation directed the proceeds to his widow rather than his children. 454 U.S. at 48-49.

The Court concluded that the ensuing dispute was "controlled by *Wissner*." *Id.* at 55. While recognizing "small differences between the SGLIA and the predecessor NSLIA," the Court held that SGLIA's "unqualified directive to pay the proceeds to the properly designated beneficiary clearly suggests that no different result was intended by Congress. And any possible ambiguity was eliminated by the Administrator's regulations that provide that a 'change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary.'" *Id.* at 57 (quoting 38 C.F.R. §9.16(e) (1980)). The Court viewed SGLIA's beneficiary-designation provisions as "controlling," and as granting the service member "an absolute right to designate the policy beneficiary"—a right "personal to the member alone." *Id.* at 59, 60.

In a separate section of its opinion, the Court held that imposing a state-law constructive trust on the policy proceeds "is also inconsistent with [SGLIA's] anti-attachment provision, 38 U.S.C. § 770(g)." *Id.* at 60. As the Court explained, *Wissner* likewise "invoked" the identical anti-attachment provision of the NSLIA as an independent ground for [decision]." *Ibid.*

3. FEGLIA

In 1954—before *Ridgway*, but after *Wissner*—Congress enacted FEGLIA. That Act provides life insurance benefits to federal employees, and includes an explicit "order of precedence" for their payment. 5 U.S.C. §8705(a). In language identical to that later used in SGLIA, Congress put the insured's

designated beneficiary at the top of the hierarchy. Next, "if there is no designated beneficiary," come the employee's widow or widower, followed by children, grandchildren, parents, executors, and next of kin. *Ibid.* To be effective, a beneficiary designation must be made by the insured, in a signed and witnessed writing received by the employing agency or the Office of Personnel Management ("OPM"), before the employee's death. *Ibid.*; 5 C.F.R. §870.802(a)-(c).

FEGLIA includes one, and only one, exception to this order of precedence: Where a "court decree of divorce, annulment, or legal separation" or a "court order or court-approved property settlement agreement incident to [such a] decree" requires paying FEGLI benefits to someone other than the designated beneficiary, then—if a certified copy of such decree has been properly filed with the employer or OPM before the employee's death—FEGLI benefits "shall be paid (in whole or in part)" to that other person "to the extent expressly provided for in the terms of" such decree. 5 U.S.C. §8705(e); 5 C.F.R. §870.801(d).

As indicated by the regulatory citations above, the statutory requirements are reinforced by regulations promulgated by OPM, which administers FEGLIA. 5 U.S.C. §8716(a). Most notably, echoing and extending the SGLIA regulation on which the Court relied in *Ridgway*, FEGLIA's regulations provide that an insured may change the beneficiary "at any time without the knowledge or consent of the previous beneficiary. *This right cannot be waived or restricted.*" 5 C.F.R. §870.802(f) (emphasis added).

These mandates are also found in OPM's contract with the Metropolitan Life Insurance Company pursuant to which all FEGLI benefits are paid

("Master Policy").[1] Specifically, in Section 11, "BENEFICIARIES," the Master Policy provides:

> Any Employee insured hereunder may designate a Beneficiary and may, from time to time, change his designation of beneficiary, only by filing written notice thereof, signed and witnessed, with his employing office or [in certain cases] * * * with the Policyholder [*i.e.*, OPM], whereupon an acknowledgment of such designation or change will be furnished the Employee. Consent of the Beneficiary shall not be requisite to any change of beneficiary. * * * A designation or change of beneficiary shall take effect only if it is received by the appropriate office prior to the death of the Employee[.]

Master Policy 25. An employee's widow(er), as such, is entitled to benefits only "[i]f, at the death of the Employee, there be no designated Beneficiary." *Ibid.*

Per 5 U.S.C. §8709(d)(1), provisions of the Master Policy that "relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any [state] law * * * which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions."

B. Factual background

As the designated beneficiary of Warren's FEGLI policy, respondent Judy Maretta ("Maretta") received FEGLI benefits upon his death. In this Court, as

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[1] This Policy is not in the record, but is subject to judicial notice. *Infra* at 52-53. With both parties' consent, the Solicitor General proposed that it be lodged with the Court.

below (see Pet. 1a), the only question is whether federal law preempts Virginia Code §20-111.1(D), which otherwise would make Maretta "personally liable" for those benefits to Warren's widow, petitioner Jacqueline Hillman ("Hillman").

The facts are undisputed and were succinctly summarized by the court below:

> In December 1996, Warren Hillman (Warren) named Maretta, his wife at the time, as the beneficiary of his FEGLI policy. The two divorced in December 1998 and Warren married Hillman in October 2002. Warren, however, never changed the beneficiary designation in his FEGLI policy. Hillman and Warren were still married when, in July 2008, Warren died. After her husband's death, Hillman filed a claim for benefits under Warren's FEGLI policy but was told the proceeds would be distributed to Warren's designated beneficiary, Maretta. Maretta filed a claim for and received the death benefits under the FEGLI policy in the amount of $124,558.03.

Pet. 4a.

Hillman then sued Maretta, asserting a right to Warren's FEGLI policy proceeds under Virginia law and seeking "an order directing Maretta to pay those proceeds to Hillman or, alternatively, a judgment against Maretta in the amount received from the FEGLI policy." Pet. 4a.

C. Virginia law

Virginia law provides that, upon divorce, "any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the

other party is revoked." Va. Code §20-111.1(A) ("Section A"). The statute defines "death benefit" to include "any payments under a life insurance contract." *Id.* §20-111.1(B). Thus, upon divorce, a former spouse automatically loses all rights as a beneficiary of any life insurance policy and—unless the insured re-designates the former spouse (or someone else)—those proceeds instead pass to the decedent's other family members.

Hillman's complaint conceded that FEGLIA's order of precedence (5 U.S.C. §8705(a)) preempts Section A. JA13; Pet. 8a. But she alleged that such preemption is effectively nullified by Section 20-111.1(D), which provides:

> If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

Va. Code §20-111.1(D) ("Section D"); see JA13.[2] As Hillman puts it, Section D is a "direct response" to

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[2] After the decision below, the Virginia legislature amended §20-111.1 to add a new subsection (E) requiring that divorce decrees contain a "conspicuous, bold print" notice that "[b]eneficiary designations for any death benefit * * * made payable to a former spouse may or may not be automatically revoked by operation of law upon the entry of a final decree of annulment or divorce," and that "the party is responsible for following any and all instructions to change such beneficiary designation given by the provider of the death benefit. Otherwise, existing benefi-

Egelhoff v. *Egelhoff*, 532 U.S. 141 (2001), which held that ERISA expressly preempts a statute similar to Section A. Br. 5.

Maretta demurred, maintaining that FEGLIA preempts Section D no less than Section A. JA22-24.

D. Decisions below

The trial court concluded that Section D is *not* preempted, overruling Maretta's demurrer and granting summary judgment to Hillman. Pet. 35a-58a (letter opinion), 32a-34a (summary judgment order).

The Virginia Supreme Court reversed. The court agreed that "FEGLIA preempts Code § 20-111.1(A)." Pet. 8a. As to Section D, the court concluded that "[i]f Congress intended for FEGLI benefits to belong to the designated beneficiary to the exclusion of all others, then Code § 20-111.1(D) 'stands as an obstacle to the accomplishment and execution of the full power and objectives of Congress' and is therefore preempted by FEGLIA." *Ibid.* (quoting *Fidelity Fed. Sav. & Loan* v. *de la Cuesta*, 458 U.S. 141, 153 (1982)).

The court recognized that "FEGLIA manifests a congressional intent for administrative convenience." Pet. 8a. More than this, however, "Congress also intended to grant an insured the right to name without restriction, and to the exclusion of all others, the person who will receive the benefits from a FEGLI policy." Pet. 9a. This reading of FEGLIA, the court continued, is demanded by this Court's decision

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ciary designations may remain in full force and effect * * *." 2012 Va. Acts ch. 493. This Act also amended Section A to open by stating: "Except as otherwise provided under federal law or law of this Commonwealth." *Ibid.*

in *Ridgway*, which involved "identical 'order of precedence' provisions" and "similar" regulations. *Ibid.*; see also Pet. 12a.

The court explained that conflicting state rulings "distinguishing *Ridgway* * * * fail to acknowledge what is apparent from a plain reading of the decision, *i.e.*, that its holding based on SGLIA's anti-attachment provision was a separate, independent basis for the result." Pet. 15a. "The Court's first holding in *Ridgway*, made in reliance on its decision in *Wissner*, emphasized that the insured's right to designate a beneficiary and to alter that choice at any time evinced Congress' intent for the policy proceeds to 'belong to the named beneficiary and no other.'" *Ibid.* (quoting *Ridgway*, 454 U.S. at 56).

Justice McClanahan dissented, citing a presumption against preemption (Pet. 16a-18a) but acknowledging that Section A, "as applicable to the facts in this case, is inconsistent" with FEGLIA (Pet. 18a-20a). In her view, *Ridgway* and *Wissner* rested on the "national defense" context of NSLIA and SGLIA and an anti-attachment provision that FEGLIA lacks. Pet. 24a-31a. She did not, however, respond to either the close textual correspondence between SGLIA and FEGLIA, or the majority's review of what this Court actually *said* in *Wissner* and *Ridgway*.

Finally, although the court below found implied conflict preemption dispositive under *Ridgway*, it noted that "Section 8709(d)(1) 'broadly preempts any state law that is inconsistent with the FEGLIA master policy'" (Pet. 3a n.1) and that "Congress' preemptive intent is more apparent in FEGLIA than in SGLIA, which contains no provision similar to 5 U.S.C. § 8709(d)(1)" (Pet. 13a n.3).

SUMMARY OF ARGUMENT

Section D is, quite simply, a brazen attempt to circumvent federal law. Its sole trigger is a finding that Section A is preempted, and its sole purpose is to achieve the very same distribution of benefits sought by Section A. If Section A is preempted—as Hillman concedes—so is Section D. Otherwise, States could circumvent the Supremacy Clause by crafting alternative means to achieve ends that are inconsistent with federal law. Established principles of conflict preemption foreclose this—as does FEGLIA's express preemption provision.

I. The Virginia Supreme Court cut to the heart of the matter: "If Congress intended for FEGLI benefits to belong to the designated beneficiary to the exclusion of all others, then Code § 20-111.1(D) 'stands as an obstacle to the accomplishment and execution of the full power and objectives of Congress.'" Pet. 8a. Congress did so intend, and this Court should thus affirm the decision below.

A. *Ridgway* and *Wissner* govern this case. Hillman relies heavily on a presumption against preemption. But even if such a presumption were warranted (and it is not), the Supremacy Clause protects the "rights and expectancies established by federal law against the operation of state law." *Ridgway*, 454 U.S. at 54. *Ridgway* interpreted SGLIA's beneficiary-designation provisions—its "controlling provisions"—as granting "an absolute right to designate the policy beneficiary." *Id.* at 59, 60. *Ridgway* thus followed *Wissner*, which had similarly interpreted NSLIA's order of precedence—"[t]he controlling section of th[at] Act." 338 U.S. at 658. FEGLIA, passed four years after *Wissner*, includes the same text and reflects the

same purpose to preempt state laws purporting to redirect proceeds from the federal beneficiary. Thus, FEGLIA too must be understood as providing a "right freely to designate the beneficiary and to alter that choice at any time"—a right "personal to the [insured] alone." *Ridgway*, 454 U.S. at 55-56, 60.

Ridgway and *Wissner* are not just indistinguishable. They make sense. Administrative convenience may explain why Congress enacted an order of precedence, but it cannot explain why Congress prioritized particular beneficiaries above others. Congress believed that a clear rule was best, and that the best evidence of intent was the employee's actual designation. Virginia law directly undermines this aspect of federal law and thwarts a system designed to effectuate federal employees' intent.

It makes no difference that Section D authorizes diverting policy proceeds *after* payment. *Ridgway* and *Wissner* both involved post-distribution claims. *Ridgway*, 454 U.S. at 49-50; *Wissner*, 338 U.S. at 659. And in any event, the point of precedence is to get funds to particular people. As the court below put it: "as with SGLIA, 'Congress has spoken with force and clarity in directing that the [FEGLI] proceeds *belong to* the named beneficiary and no other.'" Pet. 12a-13a (quoting and adding emphasis to *Ridgway*, 454 U.S. at 56). Redistribution, whenever accomplished, conflicts with Congress's purpose.

FEGLIA's lack of an anti-attachment provision cannot change that conclusion. Hillman concedes that *Ridgway* found preemption on two independent bases, and the lead holding in *Ridgway* applies here. Br. 32. The same is true of *Wissner*. 338 U.S. at 658. For that reason alone, Hillman's argument fails.

Further, when it enacted FEGLIA in 1954, Congress was acting against the backdrop of *Wissner*, which had recently held that NSLIA's beneficiary-designation provision required overturning a post-distribution, state-law money judgment against a designated beneficiary. Notably, this result was required "[w]hether [the judgment was] directed at the very money received from the Government or an equivalent amount." 338 U.S. at 659. And "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations." *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (citation omitted).

In addition, an anti-attachment provision like that in *Ridgway* and *Wissner* protects benefits not only from constructive trusts and state laws like Virginia's, but also from *taxation* and *creditors*. That Congress decided to provide such a sweeping benefit to soldiers but not to all government employees is not surprising, and certainly cannot be understood as acquiescence to all "post-distribution State laws." Br. 69. That is especially clear given *Wissner*'s explanation that the anti-attachment right had, if anything, a *narrower* preemptive effect than the beneficiary-designation right. 338 U.S. at 659. And in all events, Hillman is decidedly *not* a "creditor." She is the beneficiary of a statute that has no application outside this narrow context. Which is to say, Section D is exactly what it purports to be—a mechanism to circumvent federal law and redirect proceeds, dollar for dollar, to the State's preferred beneficiary.

B. Even setting *Ridgway* and *Wissner* aside, the differences between FEGLIA and SGLIA or NSLIA do not defeat preemption; they confirm it.

First, in 1998, Congress enacted a precisely delineated exception to the order of precedence, providing that benefits "shall be paid * * * to another person *if and to the extent expressly provided for* in the terms of any court decree of divorce," but such a decree shall be "effective" *only* if properly submitted before the employee's death. 5 U.S.C. §8705(e) (emphasis added). According to Hillman, this exception "compels[] a finding that Congress did *not* intend to preempt all State equitable remedies in FEGLI cases." Br. 42. But that is just flawed statutory interpretation. Congress said: "This far and no farther." It was acting against the backdrop of *Ridgway*, *Wissner*, and the consensus view of the federal courts of appeals that state domestic relations orders have no effect under §8705(a). And, in providing a carefully limited exception to that rule (one inapplicable here), Congress not only left the order-of-precedence provisions otherwise unchanged. It *reinforced* the part of §8705(a) providing that any "designation, change, or cancellation of beneficiary in a will or other document" that is not executed and filed as FEGLIA requires "has no force or effect." *Ibid.* In short, the exception does not destroy the rule; it proves it.

Second, were there any doubt about preemption under FEGLIA itself, OPM's implementing regulations unequivocally state that the insured's right to control the beneficiary may not be "restricted." 5 C.F.R. §870.802(f). Hillman does not dispute that Section D is a "restrict[ion]"—nor could she.

Third, FEGLIA includes an express preemption provision that not only is independently dispositive, but also underscores Congress's intent that state law not interfere with federal law "relate[d] to the nature or extent of coverage or benefits (*including payments with respect to benefits*)." 5 U.S.C. §8709(d)(1) (emphasis added). Hillman says FEGLIA's inclusion of this clause means ordinary conflict preemption principles do not apply. But she neglects *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 871-872 (2000), and *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288 (1995), which squarely foreclose that view.

C. Although Hillman acknowledges that Congress cared about providing benefits to an employee's intended beneficiary, she insists that Section D cannot be preempted because it serves that same end. *E.g.*, Br. 19-25. Yet Hillman's premise and conclusion are both mistaken.

First, the Supremacy Clause preempts conflicting state law *means* as well as conflicting ends. Thus, even if "[t]he Federal government and the States share the same interest of having FEGLI proceeds go to Federal employees' intended beneficiaries" (Br. 52), they embody mutually exclusive means of determining that intent. Most obviously, Section D "changes the default rule" (Br. 53) so as to give an entirely different meaning than does federal law to an insured's inaction upon divorce.

Second, even if the paramount goal here is effectuating Warren's intent, state law must be preempted. Whatever may be "universally recognized" as far as most individuals' intent to withhold money from their former spouses (Br. 21), Warren's was otherwise. Federal employees are specifically instructed to "ensure that [their] designation of bene-

ficiary remains accurate and reflects [their] intentions," because FEGLI "[b]enefits will be paid based on a valid designation, regardless of whether that designation still reflects [the insured's] intentions." *FEGLI Handbook* 160.[3] Indeed, OPM specifically informs insureds that "[a] divorce does not invalidate a designation that names [the insured's] former spouse as beneficiary." *Ibid.* And because federal law tells insureds in no uncertain terms that their designated beneficiary will govern—Period—Section D does *not* serve employee intent; it thwarts it.

II. Section D is also expressly preempted. Under 5 U.S.C. §8709(d)(1), provisions of the Master Policy that "relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any [state] law * * * which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions." This provision is satisfied here.

A. As a threshold matter, it is proper for the Court to reach this issue, which was preserved below and is encompassed by the Question Presented. Although the Master Policy is not in the record, the Solicitor General has sought leave to lodge the Policy, with both parties' consent, and that document may be judicially noticed. Further, although Hillman says the Court should not reach the issue, she devotes 14 pages to briefing it, and would not be prejudiced should the Court decide it.

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[3] OPM, *Federal Employees' Group Life Insurance (FEGLI) Program Handbook* (2008) ("*FEGLI Handbook*"), http://www.opm.gov/healthcare-insurance/life-insurance/reference-materials/handbook.pdf.

B. On the merits, the express preemption analysis is straightforward. Hillman contends that Section D neither "relates to group life insurance" nor is "inconsistent" with the Master Policy within the meaning of §8709(d)(1). But Section D redirects a "death benefit," which by definition includes "any payments under a life insurance contract." Va. Code §20-111.1(B). And it does so only if Section A is preempted—that is, where FEGLIA applies. Further, Hillman's view that Section D does not implicate anything of concern to §8709(d)(1) is absurd: Section D explicitly governs "payments with respect to benefits."

It is equally plain that Section D is "inconsistent with" the Master Policy. Stated simply, the Policy provides for benefits to be paid to an insured's designated beneficiary. Section D redirects those benefits to someone else, and its special mechanism for doing so is triggered only if state and federal law conflict. In other words, Section D applies *only* where it is "inconsistent with" the Policy's terms.

The decision below should be affirmed.

ARGUMENT

I. Section D conflicts with 5 U.S.C. §8705 and its implementing regulations.

Section D conflicts with FEGLIA, its implementing regulations, and its order of precedence—and is therefore preempted under *Ridgway* and *Wissner*.

"[S]tate law is naturally preempted to the extent of any conflict with a federal statute." *Crosby*, 530 U.S. at 372. This includes not only cases where "'compliance with both federal and state regulations is a physical impossibility,'" but also "instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona* v. *United States*, 132 S. Ct. 2492, 2501 (2012). "What is a sufficient obstacle is * * * informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373. And even if federal and state law serve "a common end," state law is preempted if it serves that end by "conflicting means." *Id.* at 379-380.

As petitioner repeatedly recognizes, one purpose of FEGLIA is to provide covered employees with a substantive right to ensure that life insurance proceeds actually benefit the employee's intended beneficiary. *E.g.*, Br. 10, 14, 19, 20, 52, 56, 64. That Congress provided just one exception to this right—for divorce decrees and the like that not only address life insurance proceeds, but are filed with OPM before the employee's death—only confirms that Section D restricts federal employees' choices and prevents designated beneficiaries from keeping designated funds. Moreover, petitioner openly acknowledges that Section D "changes the default rule" for determining the

employee's intent. Br. 53. Yet she ignores this Court's holdings that "[t]he fact of a common end hardly neutralizes conflicting means." *E.g.*, *Crosby*, 530 U.S. at 379.

A. *Ridgway* and *Wissner* govern this case.

1. This is an even stronger case for preemption than *Ridgway*.

a. *Ridgway* held that SGLIA precludes imposing a state-law constructive trust on insurance proceeds from a serviceman's life insurance policy. 454 U.S. at 53-63. The serviceman there was required by a state-law divorce decree to maintain his life insurance "'for the benefit of the parties' three children.'" *Id.* at 48. Shortly after divorcing and remarrying, however, he "changed the policy's beneficiary designation to one directing that its proceeds be paid as specified 'by law'"—*i.e.*, in accordance with SGLIA's "order of beneficiary precedence," which prioritized his widow ahead of his children. *Ibid.*

As the decision below and Hillman both recognize (Pet. 15a; Br. 32-33), this Court found preemption on two "independent ground[s]." 454 U.S. at 60. The Court's "second holding" is based on SGLIA's anti-attachment provision; that holding does not govern here. Br. 32. But the Court's "first holding" (*ibid.*)—that SGLIA's "controlling provisions" preclude state law from undoing the serviceman's "right freely to designate the beneficiary and to alter that choice at any time"—applies with full force. 454 U.S. at 55-60.

First, SGLIA's statutory order of precedence is identical to FEGLIA's. 454 U.S. at 52. SGLIA mirrors the original 1954 version of FEGLIA in this regard. Moreover, a 1966 amendment to FEGLIA was effectively added to SGLIA by a regulation providing

that "[n]o change or cancellation of beneficiary * * * in a last will or testament, or in any other document shall have any force or effect unless such change is received by the appropriate office." *Id.* at 53 (quoting 38 C.F.R. §9.16(f)); cf. 5 U.S.C. §8705(a) (containing the same language).

Second, SGLIA's implementing regulations, which grant insured employees broad discretion in designating beneficiaries, are nearly identical to FEGLIA's. 454 U.S. at 53. In fact, FEGLIA's regulations go further in protecting the insured's rights. They provide not only that a change of beneficiary may be made "at any time and without the knowledge or consent of the previous beneficiary," but also that "[t]*his right cannot be waived or restricted.*" 5 C.F.R. §870.802(f) (emphasis added); cf. 38 C.F.R. §9.4(b) (SGLIA) (same apart from the italicized language).

Having found preemption based on statutory and regulatory text common to both statutes, this Court's decision in *Ridgway* governs this case. See Pet. 12a, 15a. Indeed, this presents an even stronger case for preemption. Here, unlike in *Ridgway*, preemption would not override generally applicable state trust law. Section D is a targeted statute passed with one and only one purpose—to undo the effect of federal law where Section A is preempted. Thus, the conflict between federal and state law is even more stark.

b. Faced with close similarities between SGLIA and FEGLIA, Hillman argues that "conflating" the purposes of those statutes is improper, and that "the proper interpretation of FEGLIA's preemptive force comes from the differences between FEGLIA and SGLIA, not the similarities." Br. 12, 31.

As detailed below (at 30-39), the "differences" cited by Hillman in fact support preemption. Even more fundamentally, however, identifying differences does not make the similarities go away—and everything necessary to *Ridgway*'s preemption holding is found here too. Hillman's argument overlooks "that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 233-234 (2005) (plurality).

c. Aware of this difficulty, Hillman attempts to discount the significance of FEGLIA's order of precedence on the basis that "any well written insurance act" has an order of precedence. Br. 12, 28. But this not only flies in the face of *Ridgway*, it wrongly presumes that Congress needed to impose a *federal* order of precedence. Congress might just as easily have left the matter to state law, explicitly or by silence. Cf. *Empire Healthchoice Assurance Inc.* v. *McVeigh*, 547 U.S. 677, 691-692 (2006) (even in cases involving government contracts, "'[t]he prudent course' * * * is often 'to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation'") (citation omitted). In fact, Congress did just that—but only in the *sixth* level of the order of precedence: If no beneficiary is found in the first five categories, the proceeds go "to other next of kin of the employee entitled under the laws of the domicile of the employee at the date of his death." 5 U.S.C. §8705(a).

In this way, Congress confirmed the limited role that state law may play in determining who "shall be

paid." And Hillman's view neglects that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Lopez* v. *Gonzales*, 549 U.S. 47, 55 (2006) (citation omitted); see also *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1682 (2012) (in interpreting one statutory subclause, it is significant that Congress did not use a particular construction that it *did* use "in the very next subclause").

Further, while administrative convenience may in part explain why Congress enacted an order of precedence, it cannot explain why that order places particular beneficiaries above others. For example, Congress could have designated widows above named beneficiaries, or given designated beneficiaries "other than former spouses" top priority. Section D directly undermines this aspect of federal law, thus thwarting a system designed to effectuate federal employees' intent. And it makes no difference that Section D authorizes diverting the funds *after* payment, because FEGLIA's mandatory "shall be paid" requirement reflects a substantive concern that the insured's designated beneficiary receive the economic benefits of the policy. Redistribution, whenever accomplished, thus conflicts with the statute's purposes and objectives.

d. In a final effort to cabin *Ridgway*'s first holding —the one admittedly based on SGLIA's order of precedence—Hillman says the Court's decision spoke only to "pre-distribution" claims, whereas Section D operates only *after* the policy proceeds have been paid by MetLife. Br. 33 n.15. That is incorrect.

As brought in the Maine courts, *Ridgway* involved claims between the parties and against the insurer, with both parties seeking to force payment to themselves. But Ridgway's former wife—claiming for herself and her children—also sought to impose a state-law constructive trust on any proceeds paid to his widow. 454 U.S. at 49. And after the trial court held that federal law required ruling for Ridgway's widow (the federal beneficiary), "the parties stipulated, *inasmuch as the policy proceeds by that time had been deposited in court*, that *the sole issue* [on appeal] was '[w]hether or not the presiding justice erred in ruling that, on the basis of the facts found, he could not impose a constructive trust on the proceeds of Sergeant Ridgway's insurance.'" *Id.* at 49-50 (emphasis added).

Before this Court, therefore, the sole issue was whether SGLIA policy proceeds could be subjected to a *post-distribution* equitable remedy—a constructive trust—*after* the proceeds had left the insurer's hands. And that did not deter this Court from holding, based on a statutory order of precedence and implementing regulations materially identical to FEGLIA's, that such post-distribution remedies were preempted. The same result is warranted here.

2. FEGLIA's lack of an anti-attachment clause is not dispositive.

That FEGLIA contains no anti-attachment clause does not suggest otherwise. According to Hillman, by omitting such a clause from FEGLIA, "Congress has acted with force and clarity in distinguishing FEGLIA from SGLIA so that State laws will be respected post-distribution." Br. 29. But as confirmed by this Court's opinions—where the "force and clarity" con-

cept originated (see *Wissner*, 338 U.S. at 658)—the reality is exactly the opposite.

a. The anti-attachment provisions in *Ridgway* and *Wissner* provided only an "independent ground" for preemption. *Ridgway*, 454 U.S. at 60 (following *Wissner*); see Pet. 12a. The Court in *Ridgway*, for example, discussed the anti-attachment provision in a later section of the opinion than the other parts of the statute—the provisions that SGLIA and FEGLIA have in common, which the Court deemed "controlling." See 454 U.S. at 60. As the Court stated, imposing a state-law constructive trust on the policy proceeds is "*also* inconsistent with [SGLIA's] anti-attachment provision." *Ibid.* (emphasis added).

Similarly, *Wissner* relied principally on NSLIA's order of precedence—calling it "[t]he controlling section of the Act" and describing the inconsistency between the state-law ruling and the anti-attachment provision as a "further deficiency." 338 U.S. at 658, 659. In concluding that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other," the Court relied entirely on NSLIA's beneficiary-designation provision. *Id.* at 658. Thus, both *Ridgway* and *Wissner* are best read as establishing that, where federal law grants the insured an absolute right to designate a beneficiary, that is sufficient to preempt state-law claims to policy proceeds.

Indeed, the Court's anti-attachment ruling in *Wissner* was actually *narrower* than its beneficiary-designation ruling. As to the latter, the Court underscored that, "[w]hether directed at the very money received from the Government *or an equivalent amount*, the judgment below nullifies the soldier's

choice and frustrates the deliberate purpose of Congress." 338 U.S. at 659 (emphasis added); see also *id.* at 658-659 ("[the lower court ruling] substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money. We do not share appellee's discovery of congressional purpose that widows in community property States participate in the payments under the policy, contrary to the express direction of the insured").

But when it turned to the anti-attachment provision, the Court limited its ruling, stating: "The judgment under review has a further deficiency *so far as it ordered the diversion of future payments as soon as they are paid by the Government to the mother. At least in this respect*, the very payments received under the policy are to be 'seized,' in effect, by the judgment below," in conflict with NSLIA's anti-attachment provision. *Ibid.* (emphasis added). Thus, it is *Wissner*'s principal holding—which concerned the beneficiary-designation provision—that governs the post-distribution state-law claim at issue here.

b. Hillman ignores *Wissner*, mentioning the case in a single line in her last footnote. Br. 72 n.29. But in enacting FEGLIA in 1954, Congress was legislating against the backdrop of that 1950 decision, which taught that—so long as federal law gave insureds a clear right to designate the beneficiary of their choice—an anti-attachment clause was not needed to bar post-distribution claims to redirect policy proceeds. And "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe*, 552 U.S. at 370 (citation omitted). Thus, Congress would have had no

doubt when it enacted FEGLIA that providing a federal right to designate the beneficiary would preempt state laws, "[w]hether directed at the very money received" or "an equivalent amount." *Wissner*, 338 U.S. at 659.

As the court below recognized (Pet. 15a), *Ridgway* confirmed that cases in which federal law grants "the insured * * * the right freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office" are "controlled by *Wissner*." 454 U.S. at 55-56. Here, as in those cases, "it appropriately may be said: 'Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.'" *Id.* at 56 (quoting *Wissner*).

c. *Ridgway* and *Wissner* aside, Hillman reads too much into Congress's decision not to include an anti-attachment provision in FEGLIA. In her view, "Congress acted purposefully to make FEGLI proceeds vulnerable to post distribution State domestic relations causes of action." Br. 41. In general, however, Congress's silence is a poor indicator of its intent. *E.g.*, *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 11 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage."); *Watt* v. *Alaska*, 451 U.S. 259, 271 n.13 (1981). And for several reasons, that is so here.

First, Congress was not in fact silent: FEGLIA—unlike SGLIA—includes an express preemption provision. As discussed below (at 53-58), even a narrow reading of that provision reflects Congress's vigilance to prevent state law from interfering with Congress's simple rules for providing FEGLI benefits. See Pet. 13a n.3.

Second, FEGLIA's regulations go an important step further than SGLIA's in explicitly providing that the right to change beneficiaries "cannot be waived or restricted." 5 C.F.R. §870.802(f). That OPM has thus reinforced the statutory order of precedence makes congressional "silence" all the more unremarkable.

Third, an anti-attachment provision protects benefits not only from constructive trusts and state laws like Virginia's, but also from *taxation* and *creditors*. The decision not to provide that sweeping benefit to all federal employees simply cannot be equated with a decision to allow state law to run roughshod over an employee's choice of beneficiary.

Hillman argues that finding preemption based on the order of precedence "would make it impossible for Congress to enact a life insurance program designed to be convenient to administer but subject to post-distribution state equitable remedies." Br. 36. Not so. Congress could easily enact a federal version of Section A, point to state law before the sixth slot in the order of precedence, or amend FEGLIA's express preemption provision to allow States to redirect FEGLI proceeds after MetLife has cut the check.

d. Finally, Hillman's argument from the absence of an anti-attachment provision depends critically on an untenable characterization of the issue at bar. According to her, §8705(a) "cannot be the sole grounds for determining that Congress intended for FEGLI proceeds to enjoy *post-distribution creditor protection*." Br. 38 (emphasis added). But Section D does not subject FEGLI proceeds to "creditor" claims. Nor is Section D even "arguably" a "tax law." Br. 69 n.28. Upon divorce, Section A purports to revoke beneficiary designations in favor of former spouses. Section

D's only trigger is that Section A is preempted—in which case the former spouse, a disfavored beneficiary under Virginia law, is subjected to an *in personam* claim for the exact dollar amount that she received as the policy's beneficiary.

In seeking to enforce this brazen redirection of benefits, Hillman is no "creditor"; she is an alternative beneficiary. A "creditor" has an interest in a given amount of one's funds, and that interest generally does not depend on the source of those funds or some other contingency. *Black's Law Dictionary* 424 (9th ed. 2009) (a "creditor" has "a *definite* claim against another, esp. a claim that is capable of adjustment and liquidation") (second definition) (emphasis added). Here, Section D is triggered *only* by the payment of life insurance proceeds, and it is limited to that amount.

Hillman says Section D "does not directly touch FEGLI proceeds." Br. 57. This is sophistry. It is irrelevant that Section D is directed against Maretta personally, rather than the FEGLI proceeds—"[w]hether," as *Wissner* explained, the state-law claim is "directed at the very money received from the Government or an equivalent amount." 338 U.S. at 659. Either way, state law "nullifies" the insured's choice and "frustrates" Congress's "purpose." *Ibid.*

B. Even setting *Ridgway* and *Wissner* aside, FEGLIA and its implementing regulations preempt Section D.

Quite apart from *Ridgway* and *Wissner*, Section D conflicts with several provisions unique to FEGLIA and its implementing regulations. *First*, Section D purports to enforce divorce decrees, but it does not satisfy the terms of 5 U.S.C. §8705(a) or (e), which

precisely delineate the only circumstances in which such decrees may be given "force or effect." *Second*, even if FEGLIA's core order-of-precedence provisions left any doubt as to preemption, OPM's regulations unequivocally provide that the insured's right to designate a beneficiary may not be "restricted." 5 C.F.R. §870.802(f). *Third*, FEGLIA's express preemption provision (5 U.S.C. §8709(d)(1)) confirms Congress's unwillingness to brook state law interference.

1. FEGLIA clearly defines when a divorce decree may govern receipt of benefits.

a. In 1966, FEGLIA was amended to provide that "a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed [*i.e.*, signed, witnessed, and received by OPM before the employee's death] has no force or effect." 5 U.S.C. §8705(a). And in 1998, FEGLIA was again amended to provide that "[a]ny amount which would otherwise be paid to a person determined under the order of precedence * * * shall be paid (in whole or in part) * * * to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation" (or in a related court order or agreement)—*but* such a decree "shall not be effective unless it is received, before the date of the covered employee's death, by the employing agency or, if the employee has separated from service, by [OPM]." 5 U.S.C. §8705(e).

These provisions are reinforced by FEGLIA's implementing regulations, which reflect OPM's longtime interpretation that, under FEGLIA's order of precedence, no extraneous legal document of any type that fails to qualify as a valid designation of beneficiary can control payment of FEGLI benefits. Beyond mere

administrative convenience, therefore, federal law provides insured individuals with flexibility and autonomy in designating beneficiaries—and it honors those choices scrupulously.

b. Citing the §8705(e) exception, Hillman argues that "Congress did care about the equities involved," and has "direct[ed] that the proceeds of a FEGLI policy may belong to one other than the named beneficiary." Br. 12, 43. In her view, moreover, the 1998 amendment "speaks volumes about Congress's intent to permit states to enforce their equitable remedies," and "undeniably demonstrates that Congress did not intend to give Federal employees a right to freely designate and change a beneficiary of a FEGLI policy without restriction." Br. 44.

The problem for Hillman is that the best evidence of congressional intent is the text—which says that someone other than the designated beneficiary "shall be paid (in whole or in part)" only "*if and to the extent expressly provided for* in the terms of any court decree of divorce" or related agreement, and *only* where such decree is properly filed before the employee's death. 5 U.S.C. §8705(e) (emphasis added). This shows exactly how far Congress was willing to go to accommodate state law at the expense of the insured's preferences —only "*if and to the extent expressly provided for* in the terms of [the divorce] decree." *Ibid.* (emphasis added). It also shows how far Congress was willing to go to accommodate decrees that are not executed and filed with OPM—which is to say, not at all.

This is consistent with §8705(a), which provides that, unless properly filed with OPM, "a designation, change, or cancellation of beneficiary in a will or other document * * * has no force or effect." In conflict

with this provision, Section D purports to *cancel* an existing designation. And Congress's inclusion of the word "effect" in §8705(a) confirms that nothing in state law may be permitted to create a *result* under which the designated beneficiary is deprived of her policy proceeds. See *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (courts will not interpret a statutory term to render it "'inoperative or superfluous, void or insignificant'") (citation omitted).

In adding §8705(e) as an exception to the general rule of §8705(a), therefore, Congress did not overturn that rule; it reinforced it. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (citation omitted); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) ("[T]hat Congress has created specific exceptions to Rule 23 [applicable to class actions] hardly proves that the Rule does not apply generally. In fact, it proves the opposite."). And "unduly generous interpretations of the [statutory] exceptions run the risk of defeating the central purpose of the statute." *Kosak* v. *United States*, 465 U.S. 848, 853 n.9 (1984).

Hillman's contrary assessment ignores not only the text, but also the legal backdrop against which Congress was legislating—which is especially important in situations implicating the canon, *expressio unius est exclusio alterius*. See *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013). Here, as Hillman herself notes, before the 1998 addition of §8705(e), the courts "held that State divorce orders affecting FEGLI beneficiary designations were preempted." Br. 42-43. Thus, the rule then in place was one of

broad preemption without exception. Congress was legislating against the backdrop of not only *Wissner*, but also *Ridgway* and *uniform* federal precedent holding that state law remedies directed at FEGLI proceeds are preempted.[4] Congress also recognized as much:

> Under current law, * * * divorce decrees * * * do not affect the payment of life insurance proceeds. Instead, when the policyholder dies, the proceeds are paid to the beneficiary designated by the policyholder, if any, or to other individuals as specified by statute. This is required by 5 U.S.C. §8705.

H.R. Rep. No. 105-134, at 2 (1997).

With this understanding, Congress added subsection (e) as a limited *change* to federal law. If Congress had desired to create a broader exception, it easily could have. But it did not. As the House Report explains, Congress wanted to require OPM to "obey *certain* domestic relations orders" and "permit[] courts to direct the assignment of such policies *to individuals specified in domestic relations orders*." *Ibid.* (emphasis added). More importantly, that is exactly what the text says. Thus, even assuming the *expressio unius* canon "can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion'"

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[4] *E.g.*, *Metro. Life Ins. Co.* v. *Christ*, 979 F.2d 575, 577-578 & n.2 (7th Cir. 1992) (overruling prior precedent allowing imposition of state-law constructive trust on FEGLI proceeds as "conflict[ing] with FEGLIA's unambiguous language," "its implementing regulations," "basic principles of federal preemption," *Ridgway*, the United States' position, and "case law from other circuits").

(*Marx*, 133 S. Ct. at 1175), there is no such indication here.

In short, in crafting a narrow, precise exception to the otherwise strict order of precedence, Congress effectively reaffirmed the insured's right to select a beneficiary, and the primacy of federal law in determining when state law may be given "force or effect." 5 U.S.C. §8705(a). Hillman's interpretation, by contrast, "would distort [FEGLIA's] text by converting the exception into the rule" (*TRW*, 534 U.S. at 28-29), and should be rejected.

2. FEGLIA's implementing regulations forbid any "restrict[ion]" on the right of insureds to designate beneficiaries.

Section D is also preempted by FEGLIA's implementing regulations, which "have no less pre-emptive effect than federal statutes" (*de la Cuesta*, 458 U.S. at 153) and "pre-empt conflicting state requirements" (*Wyeth* v. *Levine*, 555 U.S. 555, 576 (2009)).

In addition to reiterating FEGLIA's order of precedence (see 5 C.F.R. §870.801(a), (d)(1)-(2)), OPM's regulations provide that "[a] designation of beneficiary cannot be filed by anyone other than the insured individual" (*id.* §870.802(a)), and "[a] designation, change, or cancellation of beneficiary in a will or any other document not witnessed and filed as required by this section has no legal effect with respect to benefits under this chapter" (*id.* §870.802(c)). And OPM's regulations do not stop there. They state that the insured's "right" to change her beneficiary "at any time without the knowledge or consent of the previous beneficiary * * * *cannot be waived or restricted*." *Id.* §870.802(f) (emphasis added).

The language of these regulations, and particularly §870.802(f), necessarily implies a substantive right *not* to change a beneficiary—regardless of the wishes of others or state law. And giving divorce decrees the effect of automatically cancelling FEGLI beneficiary designations means employees must do something that federal law does not require—redesignate their chosen beneficiary. Section D is thus a "restrict[ion]," and is prohibited by §870.802(f). See *Webster's Third New Int'l Dictionary of the English Language* 1937 (1961) (defining "restrict" as "to check free activity").

Hillman does not dispute that Section D restricts the insured's right to choose a beneficiary. See Br. 54. She says only that "this right is not absolute and State law can restrict it" because (1) "a divorce order filed in accordance with 5 U.S.C. §8705(e) clearly restricts an insured's right to change a beneficiary" and (2) "FEGLIA's Master Policy * * * expressly permits post-distribution enforcement of State tax laws." *Ibid.* Not so.

As to §8705(e), that Congress *itself* provided one carefully delimited exception (inapplicable here) in which divorce decrees would govern FEGLI benefits does not mean it welcomed all other exceptions—let alone those created by *state* law. As discussed above, Hillman's in-for-a-dime, in-for-a-dollar view of exceptions would "convert[] the exception into the rule." *TRW*, 534 U.S. at 28-29.

Similarly misplaced is Hillman's reliance on the Master Policy's provision in §5(C) that "nothing herein shall be construed to relieve any person who receives the payment of the amount of Life Insurance * * * from compliance with any tax law of any State." Br. 68. Generally applicable tax laws provide state

revenue, and are fundamentally different from Section D or other "post-distribution State laws" (Br. 69) that seek to effectuate an insured's intent or to vindicate *private* rights. *Ark. Corp. Comm'n* v. *Thompson*, 313 U.S. 132, 145 (1941) (noting the "historic national policy of federal non-interference with [States'] taxing power"); *Cal. State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, 851-852 (1989) (courts "must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed") (citation omitted). But even if tax laws and Section D were of a piece, Hillman's argument ignores the Policy's language—which states only that beneficiaries must respect state "tax law," not that they are "subject to post-distribution State laws."

3. Section 8709(d)(1) confirms Congress's preemptive intent.

Finally, FEGLIA states that the terms of a FEGLI contract "which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt" contrary state law. 5 U.S.C. §8709(d)(1). Added in 1980, this provision further confirms Congress's preemptive intent. Pet. 13a n.3. Indeed, even if the express preemption provision is not independently dispositive—and it is (*infra* at 53-58)—that provision at a minimum confirms the need to apply a robust version of conflict preemption. Cf. *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 104 n.2 (1992) (plurality) ("preemption categories are not 'rigidly distinct,'" and disagreement over whether "pre-emptive effect is labeled 'express' or 'implied'" may be "less important" than "agreement that the implications of the text of the statute evince a congressional intent to pre-empt").

Hillman says §8709(d)(1) "was enacted to enhance the administrative convenience of FEGLI." Br. 14-15. But the actual language is far more sweeping. In fact, *just two years earlier* Congress used essentially identical language in the Federal Employees Health Benefits Act ("FEHBA"), the stated purpose of which was "to establish uniformity in benefits" by preempting "inconsistent" state laws. S. Rep. No. 95-903, at 2 (1978). And the federal interest in a uniform regime for all federal employees, regardless of their home State, is directly implicated by Virginia's decision to automatically revoke designations in favor of a particular class of disfavored beneficiaries. Indeed, that is especially true in localities such as the D.C. area, where many employees work for the same federal agency but live in different States. Cf. Br. 22 n.7 (listing Virginia but not Maryland or D.C. among jurisdictions that automatically revoke a spouse's life insurance benefits upon divorce).

Relying principally on the plurality opinion in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), Hillman contends that FEGLIA's inclusion of an express preemption provision forecloses implied conflict preemption. Br. 13, 45-47. But Hillman overlooks *Freightliner* and *Geier*, which post-date *Cipollone* and confirm that a "pre-emption provision, by itself, does not foreclose (through negative implication) 'any possibility of implied [conflict] pre-emption.'" *Geier*, 529 U.S. at 869 (quoting *Freightliner*, 514 U.S. at 288).

As *Geier* queried:

> Why * * * would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. *In its absence,*

> *state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires.*

Id. at 871 (emphasis added). The same is true here: Hillman simply relies on negative implication, giving no other reason why Congress would not have wanted ordinary preemption principles to protect federal objectives.

In fact, by purporting to hold Maretta liable solely for receiving FEGLI proceeds as Warren's designated beneficiary, Section D does exactly what *Geier* questioned—"premise[] liability upon the presence of the very [thing] that federal law requires." *Ibid.* Far from intending such a result, Congress adopted §8709(d)(1), thus providing special protection for FEGLIA's purposes and objectives. Hillman may not turn that protection on its head to avail herself of a state-law rule that directly conflicts with federal statutory and regulatory mandates.

Moreover, this is a particularly improbable case for reading an express preemption clause to bar applying ordinary conflict preemption principles. Section 8709(d)(1) gives preemptive effect to the provisions of the FEGLI Master Policy. To accept Hillman's argument would thus mean that FEGLIA itself —the actual statute—and its implementing regulations could have no preemptive effect. That cannot be correct.

C. Even if federal and state law share a common end, their chosen means of serving that end conflict.

Hillman's argument is also foreclosed by the fact that Section D uses conflicting *means* to serve federal objectives. As she acknowledges, "[t]he Federal government has a strong interest in seeing that FEGLI proceeds are received by Federal employees' intended beneficiaries." Br. 10. Noting that FEGLIA is designed to (1) help employees with their family responsibilities; and (2) apply the best practices of private employers to the federal government, she asserts that "[b]oth of these purposes are advanced when Federal employees' intended beneficiaries receive the benefits from FEGLI policies." Br. 20. We agree. We disagree, however, that Virginia law serves this goal, and that there can be no preemption where state and federal law share a common interest. *E.g.*, Br. 11.

Hillman does not acknowledge, much less distinguish, this Court's precedents holding that federal law preempts not only conflicting ends, but also conflicting means. *E.g.*, *Crosby*, 530 U.S. at 379-380 (collecting cases). "[I]t is not enough to say that the ultimate goal of both federal and state law" is the same. *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987). And here, state and federal law create mutually exclusive means for giving effect to the insured's intent: State law treats post-divorce inaction as *cancelling* a designation in favor of a former spouse; but federal law treats it as *confirmation* that the insured intends no change. Section D is thus preempted—both because it "changes the default rule" (Br. 53) and because applying a rule other than the one embodied in federal law and communicated to federal employees will thwart Warren's intent, not serve it.

1. Section D is not a "remedy" for anything except the prescriptions of federal law.

As a threshold matter, let us be clear about what Section D is. Hillman characterizes Section D as an "equitable remedy," but it is not "equitable" and it does not "remedy" anything—except the fact that federal law requires paying benefits to a beneficiary that Virginia disfavors. Unlike in *Ridgway*, nothing in Warren's divorce decree barred him from leaving his life insurance benefits to Maretta. And if Warren *did* intend to benefit his former spouse—the conclusion drawn by federal law—then there is no equity at all in the Virginia regime, which provides no opportunity for Maretta to establish that she was indeed the intended beneficiary. Section D is a blunt, automatic, non-discretionary rule. Cf. *Wos* v. *E.M.A. ex rel. Johnson*, No. 12-98, slip op. 9 (U.S. Mar. 20, 2013).

The situation here is thus fundamentally different from one involving obligations under a contract, divorce decree, or other court order. One state court concluded: "we are confident that Congress did not intend that * * * federal employees * * * be permitted to enter into voluntary, state court-sanctioned agreements concerning the care and welfare of their children and then shirk completely the[ir] duties." *Eonda* v. *Affinito*, 629 A.2d 119, 123 (Pa. Super. Ct. 1993). Here, however, state law is not addressing a competing "choice" made by the federal employee, much less providing a remedy for "fraud or breach of trust." See *Ridgway*, 454 U.S. at 67-70 (Powell, J., dissenting). Rather, the conflict is with a state statute purporting to automatically override by legislative fiat the employee's right to designate his chosen

beneficiary—a right that "cannot be waived or restricted." 5 C.F.R. §870.802(f).

That is, compared with *Ridgway* and *Wissner*, this is a relatively easy case for preemption. In *Ridgway*, the insured changed his beneficiary designation in square violation of an obligation undertaken as part of his divorce to maintain life insurance benefitting his children. And in *Wissner*, the insured's designation kept from his wife assets to which she was otherwise entitled under state community property law. But in both cases, despite these equities, the Court enforced the insured's right to direct proceeds to whomever he wanted.

Here, neither Warren nor Maretta has done anything even arguably "inequitable," and the only thing Section D "remedies" is that Warren did not change his beneficiary designation for *years* after his divorce and remarriage. Nor is it fair to say that Section D prevents "unjust enrichment" (Br. 23), as that assumes Hillman was entitled to the policy proceeds when in fact Warren had an unfettered right—under state and federal law—to direct benefits to anyone. And while *Wissner* and *Ridgway* addressed whether Congress intended to preempt generally applicable equitable remedies, this case involves a brazen attempt to circumvent federal law—a statute targeted solely at the recipient of federal benefits *as such*. Cf. *Wos*, *supra*, slip op. 7-8 ("A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect."). That makes the case for preemption especially clear.

2. Section D is a conflicting means.

FEGLIA establishes an exclusive mechanism for recognizing post-designation divorce decrees and other forms of state-law beneficiary changes: They may be given effect only if they meet detailed substantive and procedural requirements spelled out by Congress. 5 U.S.C. §8705(e), (a). Yet Section D permits bypassing this mechanism. And since "state law * * * is preempted if it interferes with the methods by which the federal statute was designed to reach this goal" (*Ouellette*, 479 U.S. at 494), Section D must give way.

Hillman insists that Section D "does not affect a beneficiary designation at all." Br. 56. Nonsense. The Virginia regime cancels an existing designation and changes who receives the policy proceeds. That is the statute's whole point.

This is particularly problematic because Section D is triggered by a divorce decree. Federal law is explicit: Divorce decrees may be given effect, and FEGLI proceeds "shall be paid * * * to another person," only "if and to the extent expressly provided for in the terms of any court decree of divorce." 5 U.S.C. §8705(e)(1). Even then, moreover, the decree "shall not be effective unless it is received[] before the date of the covered employee's death" by "the employing agency" or OPM. *Id.* §8705(e)(2). Divorce decrees that do not meet these requirements "shall not be effective." *Ibid.* Yet making non-qualifying divorce decrees "effective" is exactly what Section D does, as there is no contention that the decree here "expressly provide[s]" for life insurance benefits to be withheld

from Maretta, much less that the decree was submitted to OPM.[5]

It makes no difference that Section D is a "default rule" that the insured may theoretically overcome by re-designation. Br. 52-53. This Court has rejected the notion "that [a] statute is saved from pre-emption simply because it is, at least in a broad sense, a default rule." *Egelhoff*, 532 U.S. at 150. And even if the conflict does not rise to the level of "impossibility"—*i.e.*, one might re-designate a former spouse—that is not the only standard for conflict preemption. Cf. *Crosby*, 530 U.S. at 380 ("that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ"). By burdening federal employees' particular choices of beneficiaries, Section D frustrates their exclusive right to determine their beneficiaries—thus undermining the purposes and objectives of FEGLIA.

Hillman freely admits that Section D "*changes* the default rule." Br. 53 (emphasis added). And either Section D is enforced—and the benefits of Warren's FEGLI policy go to Hillman, despite his designation of Maretta as his beneficiary—or the federal rules are

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[5] Hillman cites a *Ridgway* footnote that distinguished two cases involving constructive trusts imposed on NSLIA proceeds. 454 U.S. at 61 n.10 (cited at Br. 53). But even if the constructive trusts in those cases were imposed "to further the service member's dispositive intent," the Court added: "In any event, the regulations implementing the SGLIA's beneficiary designation requirements are stricter than the corresponding regulations promulgated under the NSLIA." *Ibid.* FEGLIA's regulations are stricter still.

enforced, and the benefits go to Maretta. Thus, even if both state and federal law are concerned with effectuating Warren's intent, their chosen *means* to that end are mutually exclusive.

3. Section D cannot be deemed to reflect the wishes of a federal employee.

A further problem is that Section D cannot be said to effectuate Warren's intent. Given the clarity of federal law, the only reasonable assumption is that federal employees who do not change their beneficiary after divorce do not want their choice overridden by state law. Hillman attempts to distinguish between a *designated* beneficiary and an *intended* one—arguing that no "Federal interest * * * conflicts with FEGLI proceeds going to a Federal employee's intended, albeit undesignated, beneficiary." Br. 24. But this position depends entirely on speculation that Hillman, not Maretta, is Warren's "intended" beneficiary. Federal law makes a different assumption—and it is on that basis that Warren's intent must be understood.

FEGLI insureds are specifically advised that their designations will be deemed conclusive of their intent —and that divorce will *not* invalidate designation of the former spouse:

> OPM informs insured individuals that a FEGLI "designation of beneficiary remains valid until" the insured "submit[s] a valid new designation" or assigns his ownership rights in an irrevocable "assignment of [the] insurance," or the insured's FEGLI coverage is cancelled or terminates. *OPM accordingly advises insureds that they must "ensure that [their] designation of beneficiary remains accurate and reflects [their] intentions,"* because

> FEGLI "[b]enefits will be paid based on a valid designation, regardless of whether that designation still reflects [the insured's] intentions.' In particular, *OPM informs insureds that* '[*a*] *divorce does not invalidate a designation that names* [*the insured's*] *former spouse as beneficiary*" and that an employee who experiences a "significant change in [his] life, such as a * * * divorce," thus may "want to consider completing a new designation form."

U.S. Invitation Br. 3-4 (internal citations omitted) (emphasis added) (quoting *FEGLI Handbook* 160, 168-69).

Warren's inaction should thus be understood as reflecting his intent that, despite his divorce, his policy proceeds would go to Maretta. "[W]hen there are accessible background rules that can be changed at reasonable cost[], by remaining silent parties can be said to have 'really' consented to the imposition of a default rule." Randy E. Barnett, *The Sound of Silence: Default Rules & Contractual Consent*, 78 Va. L. Rev. 821, 872 (1992). In such circumstances, "it is unrealistic to depict implied-in-law default rules as being 'imposed upon' the parties," and "not at all fictitious to characterize a choice to remain silent and let default rules operate as an expression of consent." *Id.* at 827, 865. Under "a simple default rule," "contracting parties know where they stand if they fail to specify." *Coplay Cement Co.* v. *Willis & Paul Group*, 983 F.2d 1435, 1439 (7th Cir. 1993).

Notably, Hillman's position—that "most" divorced individuals do not want to provide life insurance benefits to their former spouses "absent a post-divorce indication to the contrary" (Br. 21-22)—depends largely on state statutes invalidating pre-divorce ref-

erences to a spouse in a *will*. Br. 21-24 & nn. 6, 9. But changing a will requires far more time and trouble than changing a life insurance designation—which may explain why 30 States have auto-revocation statutes for wills, but not life insurance policies. Br. 21-23 & nn. 6-7.

In any case, the critical point is that FEGLIA sets a different default rule than Section D. That conflict alone renders Section D "without effect." *Altria Group*, 555 U.S. at 76. And even indulging the notion that federal law would countenance Hillman's distinction between "designated" and "intended" beneficiaries, there is no basis for assuming that she was Warren's intended beneficiary where Congress adopted a crystal clear rule governing intent and that rule is communicated to FEGLI insureds.

After the decision below, the Virginia legislature amended Va. Code §20-111.1 to add a new subsection E. 2012 Va. Acts ch. 493. That provision requires that divorce decrees contain, "in conspicuous, bold print," a notice that beneficiary designations "payable to a former spouse may or may not be automatically revoked by operation of law upon the entry of a final [divorce] decree," and that "any party intending to revoke such designation is responsible for following any and all instructions to change such beneficiary designation given by the provider of the death benefit. Otherwise, existing beneficiary designations may remain in full force and effect after the entry of a final decree of annulment or divorce." *Ibid.* This is an appropriate, supplemental role for state law. Substituting a conflicting default rule is not.

D. Hillman's other arguments lack merit.

1. Any presumption against preemption is overcome.

Faced with *Ridgway*, *Wissner*, and myriad other statutory and regulatory difficulties, Hillman repeatedly resorts to invoking a "presumption against preemption." *E.g.*, Br. 10, 15, 16-19, 25, 70. But such a presumption does not apply. And even if it did, it would be overcome.

a. Nothing in the Supremacy Clause suggests any reticence to preempt state law. If anything, the text tilts the other way: Federal law is "the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; see *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579-2580 (2011) (opinion of Thomas, J., joined by three other justices). Thus, as *Ridgway* explains, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." 454 U.S. at 54-55 (citation omitted) (quoted at Pet. 7a). And the fact that "[state] law governing the economic aspects of domestic relations[] must give way to clearly conflicting federal enactments * * * is but the necessary consequence of the Supremacy Clause." *Id.* at 55 (internal citations omitted).

b. Moreover, this case involves not only a weighty federal interest—the rights and expectations of federal employees under a federal life insurance regime governed by federal statutory and regulatory law and embodied in a federal contract administered by a federal agency, cf. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504-505 (1988)—but also a weak state interest.

At issue here is not a broad swath of state law, or a generally applicable equitable remedy (like unjust enrichment), but rather a narrow statutory provision whose sole and explicit purpose is to circumvent federal preemption.

c. In any event, the presumption did not deter a finding of preemption in *Ridgway* or *Wissner*, and it should not interfere with preemption here. "[T]his Court, *even in [the field of domestic relations], has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law*, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." *Ridgway*, 454 U.S. at 54 (emphasis added); see also *Wos*, *supra*, slip op. 11 ("A [state] statute that singles out * * * beneficiaries [of federal programs]" cannot avoid federal law "by relying upon a connection to an area of traditional state regulation.").

Indeed, in all but one case in which this Court has said that state law in this area must do "major damage" to federal interests to be preempted, it has found preemption. See *Ridgway*, 454 U.S. at 54; *McCarty* v. *McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979). And even the one exception rejected preemption not out of solicitude for state law, but rather based on the congressional intent underlying the particular statute at issue. See *Rose* v. *Rose*, 481 U.S. 619, 631 (1987).

In short, even if the Court applied a presumption against preemption, it could not save Section D.

2. The legislative history only confirms that Section D conflicts with Congress's intent in adopting FEGLIA.

Nor can Hillman's arguments from the legislative history (Br. 47-51) alter the outcome. For starters, there is no need to consult legislative history where, as here, the text is clear. *Milner* v. *Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011) ("ambiguous legislative history" cannot "muddy clear statutory language"). That said, the legislative history does not bear out the notion that there is a meaningful difference in congressional purpose between FEGLIA and SGLIA.

a. As enacted in 1954, FEGLIA included the order of precedence that is critical to this case. Hillman emphasizes that SGLIA was enacted to improve "the morale of the serviceman." Br. 48-49 (quoting *Ridgway*, 454 U.S. at 56-57). But so too was FEGLIA adopted to improve federal employees' morale. See 100 Cong. Rec. 10037 (1954) (Sen. Carlson, the bill's sponsor) ("[this legislation will] increase the employee's sense of family security, and provide an inducement to continue service" as well as "increased employee productivity and [a] decrease in wasteful turnover"); *id.* at 13146 (Rep. Corbett) ("[this legislation will] contribute to better morale").

Hillman insists that "nothing in the legislative history of 5 U.S.C. §8705(a) remotely suggests that Congress intended to create a benefit for Federal employees that is on par with the exceptional benefit given to the brave men and women who defend our country." Br. 50. But FEGLIA came *first*, and SGLIA's order of precedence, enacted eleven years

later, was taken *verbatim from FEGLIA*. See Pub. L. No. 89-214, §770(a), 79 Stat. 880, 883 (1965).[6]

Moreover, when proposing the program to Congress in 1954, President Eisenhower explained that FEGLIA has two purposes: "First, employees are better enabled by this low-cost life-insurance protection to carry out their responsibilities to their families. Second, the plan is another essential element in the development of a comprehensive personnel program that applies to Government service the best practices of progressive, private employers." Br. 20 (quoting S. Rep. No. 83-1654, at 5 (1954)). As Hillman concedes, "[b]oth of these purposes are advanced when Federal employees' intended beneficiaries receive the benefits from FEGLI policies." *Ibid.*

In short, Congress created a substantive right for FEGLI proceeds to be paid to the insured's designated beneficiary. *Wissner* and *Ridgway* both held that this same right preempted post-distribution claims against NSLI and SGLI beneficiaries. The same result is warranted here.

* * * * *

At every step of the way—statutory text, regulatory text, precedent, and legislative history—the decision below is correct. By setting an order of precedence that favors designated beneficiaries, Congress dictated where FEGLI policy funds must go. Because Section D seeks to redirect those funds, it conflicts with federal law and is impliedly preempted.

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[6] If, by "exceptional benefit," Hillman means to refer to SGLIA's anti-attachment provision, that provision was not added until 1970. *Ridgway*, 454 U.S. at 52. Hillman relies on legislative history from 1965. Br. 48-49.

II. Section D is also expressly preempted under 5 U.S.C. §8709(d)(1).

The court below noted that §8709(d)(1) "broadly preempts any state law that is inconsistent with the FEGLIA master policy" (Pet. 3a n.1 (citation omitted)), but—recognizing that *Ridgway* governs this case (Pet. 9a, 15a)—did not address express preemption. On that basis too, however, the judgment below can be affirmed.

A. The Court may consider express preemption.

As a threshold matter, nothing prevents the Court from affirming on express preemption grounds. The issue is within the scope of the question presented, which broadly asks whether §8705(a), "*any other provision of* [*FEGLIA*,] or any regulation promulgated thereunder preempts [Section D]." Pet. ii (emphasis added). As FEGLIA's express preemption clause is a "provision of FEGLIA," this issue is fairly subsumed within the question presented. Indeed, Hillman apparently agrees, as she revised the question to reference the "the contract ('Master Policy')" and discussed the merits of this issue for 14 pages. Br. i, 58-71.

Moreover, although the Master Policy is not part of the record, the Court may take judicial notice of its contents, which "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The Policy is a public document; the reliability of its contents is confirmed by the Solicitor General's request to lodge it with both parties' consent; and the Court has taken judicial notice of similar materials. *E.g.*, *Massachusetts* v. *Westcott*, 431 U.S. 322, 323 n.2 (1977) (Coast Guard license records); *Bowles* v. *Unit-*

ed States, 319 U.S. 33, 35 (1943) (Selective Service files and director's decision); *Tempel* v. *United States*, 248 U.S. 121, 130 (1918) (Secretary of War reports).

Finally, as the Solicitor General notes (Invitation Br. 21), the issue was preserved below. Resp. Va. Br. 8-15, 19; Pet. Va. Br. 7-20, 44-47; Va. Reply Br. 3-8, 10-13; see also Pet. 54a. And Maretta may defend the judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by" the court. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

B. Section D "relates to group life insurance" and is "inconsistent with" the Master Policy.

Although it uses somewhat different language than FEGLIA and OPM's regulations, the Master Policy includes substantially the same requirements in its provision for "BENEFICIARIES":

- A covered employee "may designate a Beneficiary and may, from time to time, change his designation of beneficiary, *only* by filing written notice thereof, signed and witnessed";
- "[a] designation or change of beneficiary shall take effect *only* if it is received by the appropriate office prior to the death of the Employee"; and
- the employee's widow or widower is entitled to benefits as such *only* "[i]f, at the death of the Employee, there be no designated Beneficiary as to all or any part of the insurance."

Master Policy 25 (emphasis added).

These requirements are given preemptive effect by 5 U.S.C. §8709(d)(1), which states:

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions.

5 U.S.C. §8709(d)(1).

1. "Relates to"

Under any natural reading of this text, Section D "relates to group life insurance." Section D creates a cause of action against a former spouse who received the payment of a "death benefit," and Virginia Code §20-111.1(B) defines "death benefit" as including "any payments under a life insurance contract." Section D plainly relates to group life insurance.

Remarkably, Hillman says Section D does not "relate to group life insurance" because it neither "reference[s] group life insurance," nor has an "impermissible connection" to FEGLIA. See Br. 65-66. But Hillman never acknowledges §20-111.1(B). And given the clarity of the text of §8709(d)(1) and the nature of Section D, this Court need not consider the ERISA precedent on which Hillman relies. Even under that precedent, however, "relates to," while not boundless, is "clearly expansive": "[A] state law relates to an ERISA plan 'if it has a connection with or reference to such a plan.'" *Egelhoff*, 532 U.S. at 146, 147 (citation omitted). Section D meets these standards with respect to group life insurance.

First, Section D "references" group life insurance. Hillman says Section D "affects all non-probate assets, not exclusively group life insurance." Br. 66. But in *District of Columbia* v. *Greater Washington Board of Trade*, 506 U.S. 125 (1992), a D.C. law "relate[d] to" ERISA because it referenced welfare benefit plans regulated by ERISA, even though it *also* applied to exempt plans. *Id.* at 131. Indeed, "a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990). Here, Section D *is* specifically designed to change who receives benefits under the Master Policy. And this Court has "virtually taken it for granted" that similar laws are not only "related to" ERISA, but preempted. *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988).

Second, "to determine whether a state law has the forbidden connection" with ERISA, the Court "'look[s] both to [ERISA's] objectives'" and "'the nature of the effect of the state law on ERISA plans.'" *Egelhoff*, 532 U.S. at 147.

Hillman says §8709(d)(1) was enacted solely to serve administrative convenience, but the proper inquiry focuses on FEGLIA *as a whole*. See *ibid.* Hillman elsewhere recognizes that FEGLIA reflects a substantive interest in "having FEGLI proceeds go to Federal employees' intended beneficiaries." Br. 52. She also concedes that FEGLIA "expressly preempts [Section A]" (Br. 5)—and if Section A "relates to group life insurance," then Section D must as well. Moreover, §8709(d)(1) not only states a clear preemptive rule, but is expressly drafted to protect the Master Policy terms regarding "the nature or extent of cover-

age or benefits (*including payments with respect to benefits*)." *Ibid.* (emphasis added).

As to the "nature of the effect of the state law" on this objective, Section D "changes the default rule." Br. 53. It operates *only* where former spouses are entitled to benefits under federal law, and it purports to change that result. This is no "incidental effect." *Egelhoff*, 532 U.S. at 148. Rather, Section D "implicates an area of core [FEGLIA] concern" (*id.* at 147)—the provision of benefits to an insured's designated beneficiary.

Thus, even under ERISA precedent, Section D "relates to group life insurance."

2. "Inconsistent with"

For the same reasons that it conflicts with FEGLIA's order of precedence, Section D is also "inconsistent with" the Master Policy's beneficiary-designation provisions.

Hillman's principal response is that Section D is not "inconsistent" because it does a better job (in her estimation) of "getting insurance proceeds to an insured's intended beneficiary." Br. 64. But as we have shown (at 45-47), that premise is flawed. Federal law dictates how to effectuate employee intent—which means conflicting state mechanisms are preempted. Cf. *Wis. Dep't of Indus.* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) ("conflict is imminent whenever two separate remedies are brought to bear on the same activity") (internal quotation marks omitted).

Next, citing the Master Policy's allowance for taxation of FEGLI proceeds, Hillman announces that Section D is "arguably a State tax law." Br. 69 n.28. This is frankly absurd. Section D says nothing about

taxes, and even if it created *a taxable event*—a dubious proposition—that would not make it a tax law.

Hillman also asserts that "OPM and MetLife understood that Congress intended this preemption power solely for administrative convenience purposes and not to supplant the effects of inconsistent State laws." Br. 68-69 & n.28. As the United States has explained, however, this is decidedly *not* OPM's view. U.S. Invitation Br. 11-14.

Nor is Hillman's "administrative convenience" contention correct. Hillman misconstrues the intent underlying §8709(d)(1) (see *supra* at 39), and her position likewise lacks textual support: "Inconsistent" means "[n]ot consistent, incompatible; incongruous; inharmonious." *Webster's Third New Int'l Dictionary of the English Language* 1144 (1961). The situation here goes beyond "incongruous" or "inharmonious." Section D and the Master Policy produce results that are mutually exclusive.

Hillman also proposes that state law "must actually conflict with the operation of a provision of the Master Policy before preemption occurs." Br. 63. But even on that mechanical reading, preemption is warranted: Section D "actually conflicts" with "operation" of the Policy provisions governing beneficiaries quoted above. *Supra* at 53. For example, like FEGLIA's statutory and regulatory provisions, the Master Policy provides that an employee's widow or widower is entitled to benefits *only* "[i]f, at the death of the Employee, there be no designated Beneficiary as to all or any part of the insurance." Master Policy 25. Further, Section D "actually conflicts" with "operation" of the Policy because the Policy directs benefits

to one person, and Section D redirects them to someone else.

Aware of these difficulties, Hillman invokes *McVeigh*, 547 U.S. 677, which analyzed a similar preemption provision in FEHBA, 5 U.S.C. §8902 (m)(1). Like §8709(d)(1), §8902(m)(1) is "unusual" in that it gives preemptive effect to "contract terms" rather than the Act itself. 547 U.S. at 697. The Court in *McVeigh* thus gave that provision a "modest reading." *Id.* at 698.

Even under a "modest reading," however, there is no question that Section D is "inconsistent" with the beneficiaries provision of the Master Policy, much less that Section D "relates to group life insurance." Section B defines "death benefit" to include any "life insurance" payment, and Section D cancels Warren's beneficiary designation—effecting a result directly at odds with the Master Policy. And even if that were unclear, §8709(d)(1) *at a minimum* warrants a robust application of principles of conflict preemption. See *Egelhoff*, 532 U.S. at 152-153 (Scalia, J., concurring) (ERISA's preemption provision can be given "both a plausible and precise content[] only by interpreting the 'relate to' clause as a reference to our ordinary pre-emption jurisprudence"); *id.* at 153 (Breyer, J., dissenting); *O'Brien* v. *Mass. Bay Transp. Auth.*, 162 F.3d 40, 43-44 (1st Cir. 1998) ("The plain language of ['inconsistent with'] provisions bespeaks 'conflict preemption.'").

* * * * *

Either way the Court approaches it, Section D is preempted. Section A is preempted because it directly voids the insured's designated beneficiary. Section D purports to reach the same result by attaching le-

gal consequences to the designation of certain kinds of beneficiaries (spouses who become former spouses), subjecting them to absolute liability should they receive any payment. Section D would thus destroy all value of the insured's designation of that beneficiary. That is "inconsistent with" federal law, and warrants preemption under both ordinary principles of conflict preemption and the terms of §8709(d)(1).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

GENE C. SCHAERR
STEFFEN N. JOHNSON
ELIZABETH P. PAPEZ
EIMERIC REIG-PLESSIS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

GEORGE O. PETERSON
Counsel of Record
TANIA M. L. SAYLOR
Peterson Saylor, PLC
10555 Main Street
Suite 320
Fairfax, VA 22030
(703) 225-3620
gpeterson@
petersonsaylor.com

LINDA T. COBERLY
WILLIAM P. FERRANTI
BENJAMIN L. ELLISON
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
bferranti@winston.com

Counsel for Respondent

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JACQUELINE HILLMAN,

Petitioner,

v.

JUDY A. MARETTA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

REPLY BRIEF FOR PETITIONER

DANIEL H. RUTTENBERG
Counsel of Record
JASON D. SMOLEN
ALAN B. PLEVY
KYUNG N. DICKERSON
BRET D. LEE
SMOLENPLEVY
8045 Leesburg Pike, Fifth Floor
Vienna, VA 22182
dhruttenberg@smolenplevy.com
(703) 790-1900

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INTRODUCTION

When Congress enacted the Federal Employees Group Life Insurance Act of 1954 ("FEGLIA"), it deliberately and artfully created a group life insurance plan that is convenient to administer and subject to the benefit and wisdom of State domestic relations laws. Congressional intention is the "touchstone" of any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). When the text and legislative history of FEGLIA and the Servicemen's Group Life Insurance Act of 1965 ("SGLIA") are viewed as a whole and compared with one another, a clear picture comes to light – that Congress intended to permit States, post-distribution, to enforce their domestic relations equitable remedies and property laws as they apply to Federal Employees Group Life Insurance ("FEGLI") proceeds.

In the background of this picture is the strong presumption against preemption of such family laws. Brief for Petitioner 16-19 ("Widow's Brief"). Its foreground includes many different elements, which are discussed in Widow's Brief and herein, such as Congress's exclusion of an anti-attachment provision from FEGLIA, FEGLIA permitting pre-distribution enforcement of divorce

decrees and assignments, the differing purposes behind FEGLIA and SGLIA, and so forth.

Respondent, Judy A. Maretta ("Ex-Wife"), attempts to blur some of the details which comprise this image in her Brief For Respondent ("Ex-Wife's Brief"). However, try as she might, she cannot avoid the inescapable conclusion that when one steps back and looks at the big picture, it is evident that Congress did not intend to bar States from enforcing family property laws which affect FEGLI proceeds *after* they have been distributed. The following addresses some of the arguments made by Ex-Wife and the United States as *amicus curiae* (the "Government").

ARGUMENT

I. Ex-Wife And The Government Concede That FEGLI Proceeds Are Not Subject To Post-Distribution Creditor Protection.

If Congress did not intend to give FEGLI benefits post-distribution creditor protection, then State laws which operate post-distribution are not preempted. VA. CODE ANN. § 20-111.1(D) (West 2009) ("Section D") makes Ex-Wife "personally liable" to Petitioner, Jacqueline Hillman ("Widow"),

in an amount equal to the FEGLI proceeds Ex-Wife received. Section D, Widow's Br. 11a.

Ex-Wife argues that Widow "is no 'creditor'". Ex-Wife's Br. 30. But, by operation of Section D, Widow became, by definition, Ex-Wife's creditor once Ex-Wife received FEGLI proceeds.[1] Ex-Wife acknowledges that "[a] 'creditor' has 'a definite claim against another, esp. a claim that is capable of adjustment and liquidation.'" Ex-Wife's Br. 30 (quoting *Black's Law Dictionary* 424 (9th ed. 2009) (second definition) (emphasis omitted). Widow is a creditor under this second definition of "creditor", *Black's* first definition ("One to whom a debt is owed"), and its third definition ("One to whom any obligation is owed, whether contractual or otherwise"). *Black's* at 424. After a judgment was obtained, as in this case, Widow became a "judgment creditor" ("A person having a legal right to enforce execution of a judgment for a specific sum of money"). *Id.* at 921. Widow is Ex-Wife's "creditor" in every sense of the word.

Ex-Wife and the Government concede that FEGLIA does "not provide that sweeping benefit

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[1] Section D makes Widow a general creditor of Ex-Wife. Section D does not give Widow a secured interest in such FEGLI proceeds and does not authorize such proceeds to be placed in a constructive trust.

[e.g., creditor protection] to all federal employees." Ex-Wife's Br. 29; Br. for the United States as Amicus Curiae 24 ("Gov't Br."). This seems obvious given the text of FEGLIA and its legislative history, as extensively discussed in Widow's Br. 27-51. Since FEGLIA does not preempt post-distribution State creditor claims, and since Section D makes Widow a creditor of Ex-Wife, FEGLIA does not preempt Section D.

Ex-Wife tries to sidestep this point. She claims that Section D is a "brazen redirection of benefits". Ex-Wife's Br. 30; *see* Gov't Br. 9, 27. First, this does not change the fact that Widow is Ex-Wife's creditor. Second, Ex-Wife is simply arguing that Section D does what most State family property laws do – determines who is entitled to family assets A divorce decree, like the one in *Ridgway v. Ridgway*, requiring that the insured maintain his children as the beneficiaries of his FEGLI policy (often done to insure against the loss of child support), 454 U.S. 46, 48 (1981), "redirects" insurance proceeds to the children. Community property laws, like that in *Wissner v. Wissner*, 338 U.S. 655, 657-58 (1950), and waivers of rights to insurance like that in *Kennedy v. Plan Adm'r,* 555 U.S. 285, 290 (2009), do also. However, arguing that Section D is a State domestic relations property law, does not change the analysis of

whether Congress intended such proceeds to be subject to State law in the designated beneficiary's hands.

Furthermore, Section D is designed to protect against the loss of support suffered by widows and children when a Federal employee dies, and this Court has found that Congress intended special protections against such loss of support for family members. *See Rose v. Rose*, 481 U.S. 619 (1987) (this Court permitted enforcement of child support order over veteran's disability benefits); *Wissner*, 338 U.S. at 659-60 (this Court noted possible exception for insurance that would be used to insure against the loss of alimony and child support); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 587 (1979) (this Court discussed exception to anti-garnishment statute for alimony and child support cases) and *Ridgway*, 454 U.S. at 70 (Powell, J., dissenting) ("I would hold that the special nature of the parental legal duty . . . imposes a constructive trust upon the proceeds of the insurance for the benefit of [the insured's] children as a matter of federal law.").

However, Ex-Wife and the Government suggest the opposite. They argue that Congress intended to protect the rights of everyone but those to whom Federal employees owe a duty of support

(i.e., banks, credit card companies, former spouses, etc.). ("To be sure, Congress permitted . . . creditors with a contract or tort claim against the beneficiary to reach the proceeds as party of any recovery.") Gov't Br. 24-25, Ex-Wife's Br. 29. Under that interpretation, a credit card company could obtain a State court order garnishing FEGLI proceeds the moment they are paid out. This is no less a redirecting of the insurance proceeds than any State family property law. However, according to Ex-Wife, States are unable to do the same to protect widows and orphans. Congress would not and did not intend to protect the interests of banks and credit card companies while specifically excluding those to whom Federal employees owe a duty of support (i.e., widow(er)s and orphans).

II. Congress's Enactment Of Section 8705(e) And Section 8706(f)(1) Negates Ex-Wife's Implied Preemption Argument.

Congress's enactment of 5 U.S.C. § 8705(e) (2013) and 5 U.S.C. § 8706(f)(1) (2013) negates the main thrust of Ex-Wife's implied preemption argument. Ex-Wife's argument for implied preemption as well as the Virginia Supreme Court's holding are based on the following premise: "If Congress intended for FEGLI benefits to belong

to the designated beneficiary to the exclusion of all others then Code § 20-111.1(D) 'stands as an obstacle to the accomplishment and execution of the full power and objectives of Congress.'" Ex-Wife's Br. 13 (quoting *Maretta v. Hillman*, 722 S.E.2d 32, 35 (2012), Petition for Writ of Certiorari 8a ("Pet.")).

Congress amended FEGLIA in 1998 to permit State divorce decrees, etc. to control FEGLI beneficiary designations. Section 8705(e), Widow's Br. 3a-4a. Congress also added Section 8706(f)(1) which expressly authorizes "an insured employee or former employee [to] make an irrevocable assignment of the employee's or former employee's incidents of ownership in the policy." App. 1a[2] Incidents of ownership include the right to designate a beneficiary. 5 C.F.R. § 870.909(a) (2013). App. 2a-3a.

Ex-Wife argues that by including Section 8705(e), Congress created one narrow exception to FEGLIA's order of precedence. Ex-Wife's Br. 31-36. This, of course, ignores the other exception created by Section 8706(f)(1). But much more importantly, Ex-Wife misses the far-reaching implications of

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[2] 5 U.S.C. § 8706(f)(2) (2013) also allows a divorce decree to direct a Federal employee to make such an irrevocable assignment. App. 1a-2a.

Sections 8705(e) and 8706(f)(1). These sections undermine Ex-Wife's position. If Congress intended all FEGLI benefits to solely belong to designated beneficiaries, it would never let divorce decrees or third-party assignees control distribution of FEGLI proceeds. Sections 8705(e) and 8706(f)(1) are the express acts of Congress to send FEGLI benefits to someone other than the Federal employee's designated beneficiary. Ex-Wife's logic is fatally flawed as it is simply impossible for FEGLI proceeds to belong to the Federal employee's designated beneficiary "to the exclusion of all others" when a divorce decree or a third-party assignee can direct that the same FEGLI proceeds be paid to someone else.

The Virginia Supreme Court missed this distinction. In determining that *Ridgway* controlled FEGLIA, the Virginia Supreme Court noted that this Court found that "Federal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary. That right is personal to the member alone. Only the insured had the power to create and change a beneficiary interest in his SGLIA insurance." *Maretta*, 722 S.E.2d at 36, Pet. 12a. (quoting *Ridgway*, 454 U.S. 59-60.). However, a Federal employee is free to irrevocably assign that right to a third party, Section 8706(f)(1), App. 1a,

and a divorce decree can dictate who receives FEGLI proceeds, Section 8705(e), Widow's Br. 3a-4a. Therefore, while a service member may be the only one capable of creating and changing a beneficiary interest in a Servicemen's Group Life Insurance ("SGLI") policy, the same is not true for Federal employees' FEGLI policies.

Ex-Wife claims that Section 8705(e) is a narrow exception that "shows exactly how far Congress was willing to go to accommodate state law at the expense of the insured's preferences." Ex-Wife's Br. 32. However, this is not a narrow exception. Congress changed FEGLI's order of precedence to permit State divorce decrees, the most common example of State law affecting FEGLI beneficiary designations,[3] to supersede Federal employees' beneficiary designations. The sheer breadth of Section 8705(e) shows Congress's intent to be liberal with the enforcement of State family property laws as they apply to FEGLI benefits.

Moreover, Section 8706(f)(1) is another example of Congress changing FEGLI's order of

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[3] *See, e.g., Metro. Life Ins. Co. v. Zaldivar*, 413 F.3d 119, 120 (1st Cir. 2005); *Metro. Life Ins. Co. v. Christ*, 979 F.2d 575, 576 (7th Cir. 1992); *McDaniel v. McDaniel*, 911 F.2d 723 (4th Cir. 1990); *Hardy v. Hardy*, 963 N.E.2d 470, 472 (Ind. 2012).

precedence to allow others to control beneficiary designations. 5 C.F.R. § 870.802(a) (2013) states that "if the insurance has been assigned . . . the insured individual cannot designate a beneficiary; only the assignee(s) can designate beneficiaries." App. 2a. The FEGLI Handbook suggests several reasons why a Federal employee may want to assign their rights to a FEGLI policy: "To Comply with a Court Order; For Inheritance Tax Purposes; To Obtain Cash before You Die; or To Pay off Debts." United States Office of Personnel Management, *Federal Employees Group Life Insurance Program Handbook* 175 (2008), *available at* http://www.opm.gov/insure/life/reference/handbook/feglihandbook.pdf ("FEGLI Handbook"). The difference between Congress's varying purposes behind FEGLIA and SGLIA is readily apparent when the two Acts are compared in this regard as service members are prohibited from assigning their incidents of ownership in SGLI policies. 38 C.F.R. § 9.6 (2013), App. 3a (SGLI proceeds "are not assignable").

Ex-Wife also seems to confuse implied and field preemption. She relies on Section 8705(e)'s requirement that a divorce decree be "properly filed before the employee's death." Ex-Wife's Br. 32 (quoting Section 8705(e)). However, this does not contradict the fact that Congress intended for

FEGLI benefits to belong to someone other than the designated beneficiary. Instead, Ex-Wife is arguing that Congress intended to occupy the field of State family property law as it applies to FEGLI benefits. In a similar vein, Ex-Wife suggests that absent evidence to the contrary, exceptions other than Section 8705(e) should not be implied. *Id.* at 33. But Section 8705(e) only changes the pre-distribution order of precedence. It does not speak to post-distribution State laws like waivers in divorce decrees, community property laws, slayer statutes, Section D, etc.

Widow acknowledges that Congress intended to occupy the field of family property law with regard to FEGLI benefits *before* they have been paid out. Congress has made this abundantly clear. 5 U.S.C. § 8705(a) (2013) states that benefits "shall be paid" to the designated beneficiary unless they are governed by a properly filed divorce decree.[4] Widow's Br. 1a-3a.

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[4] Ex-Wife argues that the language "'shall be paid' . . . reflects a substantive concern that the insured's designated beneficiary receive the economic benefits of the policy." Ex-Wife's Br. 24; *see also* Gov't Br. 15. Ex-Wife offers no support for this proposition. Furthermore, a more logical interpretation is that "shall be paid" means just that, the insurance shall be paid, for administrative convenience purposes, in accordance with the order of precedence. There is no suggestion that once the proceeds *have been paid*, States are not permitted to enforce their family laws.

Furthermore, Congress has repeatedly required filings, which direct pre-distribution where FEGLI benefits are to be paid, to be done prior to death. Divorce decrees (Section 8705(e), Widow's Br. 4a), irrevocable assignments (Section 8706(f)(1), App. 1a), and designations, changes and cancellations of beneficiaries (Section 8705(a), Widow's Br. 2a) must all be properly filed with the United States Office of Personnel Management ("OPM") prior to the insured's death.

All of these provisions show that Congress intended to preempt State laws like VA. CODE ANN. § 20-111.1(A) (West 2009), Widow's Br. 10a-11a ("Section A"), which purport to affect FEGLI benefits pre-distribution. Ex-Wife and the Government argue that these rules regarding pre-distribution of FEGLI proceeds show Congress's intent to preempt all post-distribution State family laws too. Ex-Wife's Br. 30-39; Gov't Br. 16, 23. But this reasoning is not sound as none of these provisions speak to preemption of the field of post-distribution family property laws. "[W]hile Congress has surely occupied the field of federal employee group insurance up to the point of payment of proceeds, FEGLIA . . . does not reach beyond that point." *Sedarous v. Sedarous*, 666 A.2d, 1362, 1367 (1995).

Furthermore, there is no practical difference to OPM, Metropolitan Life Insurance Company, Inc. ("MetLife") or the Federal government if parties to a divorce enforce a State divorce decree pre-distribution versus post-distribution. As such, it simply cannot be argued that Congress expressed intent to prevent post-distribution enforcement of State divorce decrees which restrict a Federal employee's right to designate a beneficiary. And if Congress intended to sanction enforcement of State divorce decrees which restrict beneficiary designations, it follows that Congress intended to permit enforcement of State divorce decrees in which an ex-spouse waives a right to FEGLI proceeds. And if Congress intended to permit enforcement of waivers of FEGLI benefits, then it also follows that Congress intended to allow enforcement of laws such as Section D, which operate in much the same way.

III. *Ridgway* and *Wissner* Do Not Control The Outcome In This Case.

A. Holdings Regarding The Orders of Precedence In SGLIA and NSLIA Do Not Control This Case.

Ex-Wife argues that *Ridgway* and *Wissner* control this case because the order of precedence

contained in SGLIA is identical to that contained in FEGLIA. Ex-Wife's Br. 6, 21; see also Gov't Br. 15, 24. However, FEGLIA and SGLIA do not have the same orders of precedence. Even if they did, the order of precedence by itself does not dictate FEGLIA's preemptive reach. Instead, such scope should be determined by reading the provision in the context of the entire Act. Furthermore, FEGLIA and the National Service Life Insurance Act of 1940 ("NSLIA") use very dissimilar language to establish their different orders of precedence. Accordingly, *Ridgway* and *Wissner* do not control this case.

1. SGLIA and FEGLIA have different orders of precedence.

FEGLIA and SGLIA do not have the same orders of precedence. SGLIA's order of precedence is clearly stated in 38 U.S.C. § 1970 (2013), Widow's Br. 6a-8a. It starts with the insured's designated beneficiary. However, FEGLIA's order of precedence as stated by OPM in the FEGLI Handbook is as follows:

> **Order of Precedence**
>
> When you die, [the Office of FEGLI ("OFEGLI")] will pay benefits in a particular order, as set by law:

- If you assigned ownership of your life insurance . . ., OFEGLI will pay benefits: *First* to the beneficiary(ies) designated by your assignee(s), if any; *Second*, if there is no such beneficiary(ies), to your assignee(s).
- If you did *not* assign ownership and there is a valid court order on file, OFEGLI will pay benefits in accordance with that court order.
- If you did not assign ownership and there is no valid court order on file, OFEGLI will pay benefits:
    - First, to beneficiary(ies) you validly designated;
    - Second, if no such beneficiary (ies) [sic], to your widow or widower;
    - Third, if none of the above, to your child or children . . .

FEGLI Handbook 7-8. OPM's phrasing of FEGLIA's order of precedence is logical, succinct

and clearly highlights the differences between FEGLIA's and SGLIA's orders of precedence.

The Virginia Supreme Court, however, did not appreciate this difference. It found that "FEGLIA and SGLIA contain identical 'order of precedence' provisions" and similar regulations. *Maretta*, 722 S.E.2d at 35, Pet. 9a. It then relied so heavily on this incorrect finding that it "considered *Ridgway* to be 'highly persuasive, if not binding, in construing FEGLIA'." *Id.* (citation omitted). However, FEGLIA and SGLIA do not have identical orders of precedence and *Ridgway* is not "binding" in construing FEGLIA.

2. FEGLIA's and SGLIA's similar orders of precedence do not dictate that *Ridgway* controls this case.

Ex-Wife argues that FEGLIA and SGLIA have identical orders of precedence and "that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." Ex-Wife's Br. 23 (quoting *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233-234 (2005)). Accordingly, she claims that this Court's holding in *Ridgway* regarding

SGLIA's statutory order of precedence applies to FEGLIA. *Id.*

First, as discussed above, FEGLIA and SGLIA do not have identical orders of precedence. FEGLIA's starts with insurance proceeds being paid: i) to the designated beneficiary of irrevocable assignees, Section 8706(f)(1), App. 1a; then if none, ii) to the irrevocable assignees, *id.*; then if none, iii) in accordance with court orders, Section 8705(e), Widow's Br. 3a-5a; then if none, iv) to the Federal employee's designated beneficiary, Section 8705(a), 1a-3a. SGLIA, on the other hand, starts with the service member's designated beneficiary. 38 U.S.C § 1970, Widow's Br. 6a-8a.

Second, as discussed in detail below and in Widow's Brief, FEGLIA and SGLIA have very different purposes. Sec. III(B), *infra*; Widow's Br. 47-51. Third, the two Acts were not enacted shortly after one another; SGLIA was enacted 11 years after FEGLI in 1965. Fourth, a presumption is just a presumption. It is not a bar. For example, in *Rose*, this Court addressed the anti-attachment provision governing veterans' benefits, 38 U.S.C. § 3101(a) (currently in 38 U.S.C. § 5301(a)(1) (2013)). 38 U.S.C. § 5301(a)(1) contains the same strong anti-attachment language found in SGLIA and NSLIA. However, this Court specifically

distinguished *Ridgway* and *Wissner* based on the different purposes behind the statutes. *Rose*, 481 U.S. at 631-34. *Ridgway* and *Wissner* are distinguishable from the present case for the same reason. The significantly different purposes and objectives behind FEGLIA and SGLIA overcome any inference of preemption of post-distribution State domestic relations laws created by *Ridgway's* holding.

Furthermore, there should not be an inference that *Ridgway* applies to FEGLIA because Congress had to give Federal employees the ability to designate beneficiaries regardless of any intent to preempt post-distribution State family property laws. FEGLIA is designed to be on par with private group life insurance plans which permit insureds to designate beneficiaries. S. Rep. No. 83-1654, at 5 (1954) ("[T]he plan is another essential element in the development of a comprehensive-personnel program that applies to Government service the best practices of progressive, *private* employers." (emphasis added)). It is impossible for Congress to create an administratively convenient group life insurance plan similar to such private group life insurance plans (i.e., where the insured has ability to designate beneficiaries and insurance proceeds are subject to post-distribution State family property laws), without giving the insured

the ability to designate the beneficiaries.[5] Therefore, Congressional intent to preempt all post-distribution family property laws should not be read in a vacuum into a provision which merely authorizes an insured to designate a beneficiary. Instead, such intent should be determined by examining the entirety of FEGLIA. As previously discussed, when one does so, the clear picture shows Congress intended to allow such laws to operate.

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[5] Ex-Wife admits that "[a]dministrative convenience may explain why Congress enacted an order of precedence." Ex-Wife's Br. 14. But she suggests that Congress did not have to let Federal employees designate beneficiaries at all and instead could have let State law determine where the proceeds are to be paid by having "the proceeds go 'to other next of kin of the employee entitled under the laws of the domicile of the employee at the date of his death.'" Ex-Wife's Br. 23 (quoting Section 8705(a)). However, such an arrangement would not be administratively convenient as MetLife would have to know the laws of all 50 states and then determine which law applied in each individual case. Furthermore, the Federal government would be offering inferior insurance under FEGLIA to that offered by private companies if it did not permit Federal employees to designate beneficiaries.

3. The use of different language in FEGLIA's order of precedence from that of NSLIA's shows Congressional intent to preclude *Wissner's* judicial interpretations from FEGLIA.

FEGLIA and NSLIA use very different language to establish their respective orders of precedence, and SGLIA was enacted after FEGLIA. Nevertheless, both Ex-Wife and the Government cite to the concept that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the *same language* in a *new* statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." Ex-Wife's Br. 27 (quoting *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008)) (emphasis added); Gov't Br. 16. This presumption would have been applicable in this case if FEGLIA included the "same language" as in NSLIA or if *Ridgway* was decided before FEGLIA was enacted in 1954 neither of which is the case. *Ridgway* was decided 27 years later in 1981, and Congress did not use the same language contained in NSLIA. This Court stated in *Wissner* that "[t]he controlling section of the Act" was 38 U.S.C. § 802(g) (1949) (the current version of that section is now at 38 U.S.C. § 1916 (2013)). 38 U.S.C. § 802(g) provided:

> (g) The insurance shall be payable only to a widow, widower, child (including stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided.

Id.[6] The only similarity between NSLIA's order of precedence and Section 8705(a) is that they both permit an insured to designate a beneficiary of life insurance. It can hardly be said that Congress used the "same language".

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[6] NSLIA's order of precedence in the absence of a beneficiary designation, 38 U.S.C. § 802(h) (1949), is not specifically cited in *Wissner*. Even if it was, it is not the same language as that contained in Section 8705(a).

In fact, a better argument is that Congress was aware of the *Wissner* case and the language contained in NSLIA and purposely used different language in FEGLIA to avoid that result. This interpretation of Congressional intent is reinforced by Congress's conscientious and deliberate use of the anti-attachment provision. NSLIA has an anti-attachment provision which was discussed in *Wissner*. *Wissner*, 338 U.S. at 659. When Congress enacted FEGLIA a few years later, it did not include such a provision. Later, after Congress enacted SGLIA, it again included an anti-attachment provision. Clearly, Congress was treating FEGLIA differently from SGLIA and NSLIA.

B. FEGLIA Is Intended, In Part, To Be Used By Federal Employees To Carry Out Their Responsibilities To Their Families.

Ex-Wife and the Government argue *Ridgway* and *Wissner* control this case. Ex-Wife's Br. 21-30; Gov't Br. 15-29. However, this Court distinguished the application of those cases in *Rose* because Congress intended the government benefits in that case to be used, in part, to support veterans' families. 481 U.S. at 631. *Rose* addressed whether a State court could enforce child support

obligations "where the veteran's only means of satisfying this obligation is to utilize benefits received from the Veterans' Administration under 38 U.S.C. § 314 as compensation for a service-connected disability." *Id.* at 621-22 (The current version of 38 U.S.C. § 314 (1987) is located at 38 U.S.C. § 1114 (2013).). Much like FEGLI proceeds, the payment of veterans' benefits are subject to many statutes designed "to achieve uniformity in the administration of veterans' benefits and protect the [Veterans'] Administration from expensive and time-consuming litigation." *Id.* at 629.

The Court distinguished *Ridgway* and *Wissner* because it determined that "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Id.* at 631. Ex-Wife acknowledges that the first of the two main purposes behind establishing FEGLIA is to better enable Federal employees "to carry out their responsibilities to their families." Ex-Wife's Br. 51 (quoting Widow's Br. 20, in turn quoting S. Rep. No. 83-1654, at 5 (1954)). Therefore, *Ridgway* and *Wissner* should be distinguished in this case too because Congress intended for FEGLI proceeds to be used, in part, to benefit Federal employees' families and Section D protects Federal employees' widow(er)s and children.

IV. 5 C.F.R. § 870.802(f) Does Not Mandate Preemption Of Post-Distribution State Domestic Relations Property Laws.

Ex-Wife relies heavily on FEGLIA's regulation 5 C.F.R. § 870.802(f) (2013) (Widow's Br. 5a) which provides "that a change of beneficiary may be made 'at any time and without the knowledge or consent of the previous beneficiary,' [and] that *'this right cannot be waived or restricted.'*" Ex-Wife's Br. 22 (quoting 5 C.F.R. § 870.802(f)) (emphasis added by Ex-Wife). However, as discussed above, Section 8705(e) permits State divorce decrees, etc. which restrict a Federal employee's ability to designate a beneficiary, to control FEGLI beneficiary designations. Section 8705(e), Ex-Wife's Br. 3a-5a. Additionally, Federal employees may waive their rights to designate the beneficiaries of their FEGLI policies by irrevocably assigning such rights to others. Section 8706(f)(1), App. 1a.

Furthermore, neither Section A nor Section D is a waiver or restriction of this right. Ex-Wife claims that "Hillman does not dispute that Section D restricts the insured's right to choose a beneficiary". Ex-Wife's Br. 36. However, Widow has maintained at every stage of this litigation that "Va. Code § 20-111.1(D) does not in any way, shape

or form restrict a Federal employee's right to freely 'designate the beneficiary and to alter that choice at any time.'" Widow's Br. 52-53 (citation omitted). The Government states that Section D "deprives the insured of the power to decide who will benefit from the insurance policy." Gov't Br. 32. But under both Section A and Section D, a Federal employee controls the beneficiary designation at all times, both before and after a divorce. If a Federal employee wants an ex-spouse to receive FEGLI benefits, he or she simply needs to make a post-divorce designation. The Government suggests this post-divorce designation makes a Federal employee "shoulder such a burden". Gov't Br. 21. However, Section D does not restrict a Federal employee at all and cannot reasonable be compared to the State court order in *Ridgway* which purported to force Sargent Ridgway against his will to maintain his children as the beneficiaries of his SGLI policy. *Ridgway*, 454 U.S. at 48.

V. There Is A Presumption That Section D Is Permitted Because It Shares A Common Purpose With FEGLIA.

Ex-Wife argues that this Court should not give great weight to the fact that FEGLIA and Section D serve a common purpose. Ex-Wife's Br. 40. She states that Widow "does not acknowledge,

much less distinguish, this Court's precedents holding that federal law preempts not only conflicting ends, but also conflicting means." *Id.* Widow acknowledges these precedents. However, these precedents are inapplicable or otherwise distinguishable from this case.

First, there are no conflicting means between FEGLIA and Section D. The two Acts work harmoniously together. MetLife quickly and easily pays the insurance proceeds to the designated beneficiary. Thereafter, when MetLife and OPM have no further involvement with the policy, Section D makes Ex-Wife personally liable to Widow.

Second, as stated in Widow's Brief, "[n]ormally there is an added presumption against preemption of State laws when the Federal government and the state share the same interests." Widow's Br. 18 (citing *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666-67 (2003); *New York State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 413, 421 (1973)). However, Section D is a State "family property law [that] must do 'major damage' to 'clear and substantial' federal interest before the Supremacy clause will demand that state law be overridden." *Hisquierdo*, 439 U.S. at 581 (citation omitted). Such State

domestic relations property laws should only be preempted if "Congress has 'positively required by *direct enactment*' that state law be preempted." *Id.* (emphasis added).[7]

Therefore, while preemption generally lies where there are conflicting means, in the case of family property laws, the conflicting means should only come from "direct enactment" found either: i) in express preemption; or ii) when it is impossible "to comply with both state and federal requirements" (referred to in Widow's Brief as "Direct Conflict Preemption"). *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (cited for definition of Direct Conflict Preemption). It should not be inferred in family law cases to come from the indirect form of implied preemption that occurs

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[7] Ex-Wife argues that there is no presumption against preemption of domestic relations laws and even suggests that "[i]f anything the text [of the Supremacy Clause] tilts the other way." Ex-Wife's Br. 48. This presumption has been repeatedly recognized by this Court recently and as early as 1890. *See e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001); *Rose*, 481 U.S. at 625; *Ridgway*, 454 U.S. at 54-55;, *Hisquierdo*, 439 U.S. at 581; *United States v. Yazell*, 382 U.S. 341, 352 (1966); *In re Burrus*, 136 U.S. 586, 593-594 (1890). Nevertheless, Ex-Wife asserts that since this presumption has been overcome, it does not really exist. Ex-Wife's Br. 48. According to her, it is no more than lip-service to the States. *Id.* While this strong presumption against preemption of family laws may be overcome under appropriate circumstances, it certainly exists.

when "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'", *id.* (citation omitted), (referred to in Widow's Brief as "Indirect Implied Preemption"), as there is no "direct enactment" which "positively requires" preemption in such cases.

The cases cited by Ex-Wife which found conflicting means to a common end dealt with States enacting laws to regulate areas generally controlled by the Federal government. For example, *Crosby v. Nat'l Foreign Trade Council* dealt with Massachusetts implementing international foreign policy by placing trade restrictions on Burma. 530 U.S. 363, 366-67 (2000). This Court found that these restrictions undermined the President's ability to use economic sanctions and other diplomatic means to influence Burma. *Id.* at 381. Furthermore, the European Union and Japan lodged "formal complaints against the United States in the World Trade Organization (WTO), claiming that the state Act violates certain provisions of the Agreement on Government Procurement." *Id.* Similarly, *Int'l Paper Co. v. Ouellette* dealt with conflicting laws between New York and Vermont with regard to the enforcement of the Clean Water Act. 479 U.S. 481, 483-84 (1987). The conflicting means in these cases

directly interfered with the ability of the Federal laws to operate. They should not be analogized to post-distribution domestic relations property laws which are generally left to the States.

Ex-Wife and the Government then argue that FEGLIA and Section D do not share a common purpose in this case because the decedent, Warren Hillman ("Warren"), received the 215 page July 2008 FEGLI Handbook.[8] Ex-Wife's Br. 46, Gov't Br. 28. They both quote the 160th page which states that "[a] divorce does not invalidate a designation that names your former spouse as beneficiary". Ex-Wife's Br. 46; Gov't Br. 28. Accordingly, they argue that Warren had actual knowledge that he had to change his beneficiary designation. *Id.* However, if one assumes that Warren closely read such voluminous materials about his group life insurance policy, it would also be fair to assume that he was aware of Virginia's

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[8] Ex-Wife also argues that Warren's intent could be determined from his divorce decree. Ex-Wife's Br. 41 ("[N]othing in Warren's divorce decree barred him from leaving his life insurance benefits to Maretta."). Warren's divorce decree and the property settlement agreement it incorporates by reference are not in the record. Widow acknowledges that Ex-Wife inadvertently referenced this non-record material. Nevertheless, no evidence that Warren intended to leave his FEGLI policy proceeds to Ex-Wife was presented at trial, and any suggestion of that being his intent is completely unfounded.

public laws which make Ex-Wife personally liable to Widow. Therefore, one should not assume that Warren's mere receipt of the 2008 215 page FEGLI handbook expressed his intent that his ex-wife receives his FEGLI benefits.

VI. Section 8709 (d)(1)'s Existence Suggests That Section 8705(a) Does Not Preempt Section D.

The existence of FEGLIA's express preemption provision, 5 U.S.C. § 8709(d)(1) (2013), Widow's Br. 5a, bolsters the argument that Section 8705(a) does not preempt Section D. Widow cited *Cipollone* for the proposition that this Court should not infer a broader preemptive scope in FEGLIA when it has an express preemption provision which already indicates FEGLIA's preemptive reach. Widow's Br. 45-47. Widow acknowledges that this Court has significantly curtailed this inference in *Arizona v. United States*, 132 S.Ct. 2492, 2504 (2012) and *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000). Nonetheless, the existence of Section 8709(d)(1) still creates an inference that Section 8705(a) does not preempt post-distribution State domestic relations property laws in this case.

If, as Ex-Wife and the Government suggest, Congress intended for Section 8705(a) to have such

a broad preemptive scope, then it would not have needed to include Section 8709(d)(1). Per their reasoning, Section 8709(d)(1) is superfluous. All State laws which affect FEGLI benefits would already be preempted under Section 8705(a) as they are by SGLIA's order of precedence statute. When possible, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citation omitted). Accordingly, Section 8705(a) should not be interpreted so as to make Section 8709(d)(1) "inoperative or superfluous, void or insignificant." *Id.* In other words, with Section 8709(d)(1), Congress has provided a very "reliable indicium of congressional intent with respect to state authority" which was not available in *Arizona* or *Grier*. *Cipollone*, 505 U.S. at 517. Regardless of the strength of this presumption against preemption, under no circumstances, does Section 8709(d)(1) create the opposite presumption in favor of preemption as suggested by Ex-Wife. Ex-Wife's Br. 37.

CONCLUSION

For the foregoing reasons and those stated in Widow's Brief, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully, submitted.

DANIEL H. RUTTENBERG
Counsel of Record
JASON D. SMOLEN
ALAN B. PLEVY
KYUNG N. DICKERSON
BRET D. LEE
SMOLENPLEVY
8045 Leesburg Pike, Fifth Floor
Vienna, VA 22182
dhruttenberg@smolenplevy.com
(703) 790-1900

April 15, 2013

APPENDIX

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

The additional relevant provisions of FEGLIA are as follows:

5 U.S.C § 8706(f)(1) (2013) provides:

> (f)(1) Under regulations prescribed by the Office, each policy purchased under this chapter shall provide that an insured employee or former employee may make an irrevocable assignment of the employee's or former employee's incidents of ownership in the policy.

5 U.S.C § 8706(f)(2) (2013) provides:

> (2) A court decree of divorce, annulment, or legal separation, or the terms of a court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation, may direct that an insured employee or former employee make an irrevocable assignment of the employee's or former employee's

incidents of ownership in insurance under this chapter (if there is no previous assignment) to the person specified in the court order or court-approved property settlement agreement.

The additional relevant provisions of the Federal regulations promulgated under FEGLIA are as follows:

5 C.F.R. § 870.802(a) (2013) provides:

(a) Except as provided in paragraph (i) of this section, if an insured individual wants benefits paid differently from the order of precedence, he/she must file a des-ignation of beneficiary. A designation of beneficiary cannot be filed by anyone other than the insured individual. Exception: if the insurance has been assigned under subpart I of this part, the insured individual cannot designate a beneficiary; only the assignee(s) can designate beneficiaries.

5 C.F.R. § 870.909(a) (2013) provides:

(a)(1) An assignment automatically cancels an insured individual's prior

designation of beneficiary. After making an assignment, an individual cannot designate a beneficiary; the right to designate beneficiaries transfers to the assignee.

(2) Each assignee may designate a beneficiary or beneficiaries to receive insurance benefits upon the death of the insured individual and may also later change the beneficiaries. An assignee may designate himself/herself the primary beneficiary and name another contingent beneficiary(ies) to receive insurance benefits if the assignee dies before the insured individual.

The additional relevant provision of the Federal regulations promulgated under SGLIA is as follows:

38 C.F.R. § 9.6 (2013) provides:

§ 9.6 Assignments.

Servicemembers' Group Life Insurance, Veterans' Group Life Insurance and benefits thereunder are not assignable.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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No. 11-1221

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JACQUELINE HILLMAN, PETITIONER

v.

JUDY A. MARETTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ELAINE KAPLAN
General Counsel
R. ALAN MILLER
Associate General Counsel
SUSAN G. WHITMAN
Deputy Assistant General Counsel
JAMES MUETZEL
Senior Attorney
Office of Personnel Management
Washington, D.C. 20415

Library of Congress
Law Library

QUESTION PRESENTED

The Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), 5 U.S.C. 8701 *et seq.*, and its implementing regulations state that FEGLI benefits "shall be paid" to the beneficiary properly designated by the insured, 5 U.S.C. 8705(a), and specify that the "right" of the insured to designate that beneficiary at any time cannot be waived or restricted, 5 C.F.R. 870.802(f). It is undisputed that FEGLIA preempts state laws like Section 20-111.1(A) of the Virginia Code, which purport to revoke automatically an insured's designation of his spouse as the beneficiary of his life insurance upon the entry of a divorce decree terminating the insured's marriage.

Section 20-111.1(D) of the Virginia Code provides that if Section 20-111.1(A)'s revocation-upon-divorce provision "is preempted by federal law" with respect to the payment of a death benefit and the insured's former spouse receives a death-benefit payment to which another person would have been entitled if Section 20-111.1(A) had "not [been] preempted," then the former spouse shall be "personally liable [to that other person] for the amount of the payment." The question presented is:

Whether FEGLIA and its implementing regulations preempt Section 20-111.1(D)'s authorization of a state-law cause of action against the insured's designated beneficiary to obtain the amount of life insurance benefits that FEGLIA required to be paid to the designated beneficiary.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), ch. 752, 68 Stat. 736 (5 U.S.C. 8701 *et seq.*), and its implementing regulations preempt a state law relating to entitlement to federal insurance proceeds. The Office of Personnel Management (OPM) is a party to the life insurance contract that provides coverage for over four million federal employees and retirees pursuant to FEGLIA; it also plays a central role in administration of the life-insurance program, which distributes more than $2 billion every year to beneficiaries from a federal fund. See OPM, *Life Insurance*, http://www.opm.gov/insure/life; OPM, Office of the Inspector General, *Final Audit Report No. 2A-II-00-09-065*, at 2 (2010). Moreover, the federal government pays at least one-third of the premiums for an employee's basic in-

surance coverage under FEGLIA. See GAO, *Federal Employees' Group Life Insurance: Retirement Benefit and Retained Asset Account Disclosures Could Be Improved* 1-4, 12 (2011) (*GAO Report*). In response to this Court's invitation, the United States submitted a brief suggesting that the Court grant the petition for a writ of certiorari. Accordingly, the United States has a substantial interest in the resolution of this case.

STATEMENT

1. Congress enacted FEGLIA to provide "a low-cost group life insurance program to Federal employees." H.R. Rep. No. 2579, 83d Cong., 2d Sess. 4-5 (1954); accord S. Rep. No. 1654, 83d Cong., 2d Sess. 2, 5 (1954). FEGLIA authorizes OPM to purchase one or more group life insurance policies to provide benefits under the Act. 5 U.S.C. 8709(a). OPM has accordingly entered into a group life insurance contract (Group Policy No. 17000-G) with the Metropolitan Life Insurance Company (MetLife). See OPM, *Federal Employees' Group Life Insurance (FEGLI) Program Handbook* 1, 181 (2008) (*Handbook*), http://www.opm.gov/insure/life/reference/handbook/feglihandbook.pdf. MetLife pays all FEGLI benefits "according to [that] contract," 5 C.F.R. 870.102, by drawing on a federal fund, see *GAO Report* 12.

a. Congress has specified that FEGLI benefits "shall be paid" upon an insured employee's death to the employee's survivors under a statutory "order of precedence." 5 U.S.C. 8705(a); see 5 C.F.R. 870.801(a). If the employee has "designated" a "beneficiary * * * in a signed and witnessed writing received before death" in the appropriate federal office, the benefits "shall be paid" to that designated beneficiary. 5 U.S.C. 8705(a); see 5 C.F.R. 870.802(b). "[A] designation, change, or

cancellation of beneficiary in a will or other document not so executed and filed has no force or effect." 5 U.S.C. 8705(a). If the employee fails properly to designate a surviving beneficiary, the insurance proceeds "shall be paid" to the employee's relatives or estate in the order specified in 5 U.S.C. 8705(a). *Ibid.* After a designated beneficiary, a surviving widow or widower is next in the order of precedence. *Ibid.*; see 5 U.S.C. 8705(c) (providing for "payment * * * to the claimant who in the judgment of [OPM] is equitably entitled thereto" when no party in order of precedence has claimed payment for two years).

OPM's regulations (5 U.S.C. 8716(a)) provide that an insured employee has the "right" to "change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary." 5 C.F.R. 870.802(f). "This right cannot be waived or restricted." *Ibid.*[1]

There is one exception to the insured's right of designation and the requirement of payment to the designated beneficiary. Under 5 U.S.C. 8705(e), which was added to the statute in 1998, if the government receives a "court decree of divorce, annulment, or legal separation" or a "court order or court-approved property settlement agreement incident to [such a] decree" requiring the insured's FEGLI benefits to be paid to a specific person, the benefits "shall be paid (in whole or in part)" to that person "to the extent expressly provided for in the terms of" the decree, order, or agreement. 5 U.S.C. 8705(e)(1). Such a court-ordered designation is effective, however, only if a certified copy of the relevant document "is received, before the date of the covered

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[1] In certain circumstances the insured can assign his interest in the insurance, including his designation right, to someone else. See 5 U.S.C. 8706(f); 5 C.F.R. 870.901(a) and (i), 870.902.

employee's death," by the appropriate federal office. 5 U.S.C. 8705(e)(2); see 5 C.F.R. 870.801(d). If so received, it will (unless modified) prevent the insured employee from "designat[ing] a different beneficiary" without the consent of the person specified. 5 C.F.R. 870.802(i)(1).

b. OPM informs insured employees that (subject to the requirements of Section 8705(e)) a FEGLI "designation of beneficiary remains valid until" the insured "submit[s] a valid new designation" or assigns his ownership rights in an irrevocable "assignment of [the] insurance," or the insured's FEGLI coverage is cancelled or terminates. *Handbook* 168-169; see 5 C.F.R. 870.802(g); OPM, *FEGLI Program Booklet* 21-22, 2004 (*Booklet*), http://www.opm.gov/healthcare-insurance/life-insurance/reference-materials/federalbooklet.pdf. OPM accordingly advises insureds that FEGLI "[b]enefits will be paid based on a valid designation, regardless of whether that designation still reflects [the insured's] intentions." *Handbook* 160; see *id.* at 13. Of particular salience, OPM informs insureds that "[a] divorce does not invalidate a designation that names [the insured's] former spouse as beneficiary," and urges an employee who divorces to be "sure" that his designation is "ac curate and reflects [his] intentions" and to "consider completing a new designation form" to "remove a former spouse." *Id.* at 160; see *id.* at 164; *Booklet* 22; OPM, *Life Insurance: Designating a Beneficiary*, http://www.opm.gov/healthcare-insurance/life-insurance/designating-a-beneficiary/#url=Forms-for-Designations.

c. In 1980, Congress amended FEGLIA to include an express preemption provision. See 5 U.S.C. 8709(d)(1). Section 8709(d)(1) states that "[t]he provisions of any

contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions." *Ibid.*

The group life insurance contract between OPM and MetLife pursuant to which FEGLI benefits are paid is not in the record in this case, but the United States sought to lodge it with the Court in connection with the response to the Court's invitation to submit the views of the Solicitor General at the petition stage. With respect to payment to beneficiaries, the contract echoes FEGLIA's basic requirements. It provides that a widow is entitled to benefits only "[i]f, at the death of the Employee, there be no designated Beneficiary." Contract 25; see *id.* at 18. It also provides that "[a]ny Employee insured hereunder may designate a Beneficiary and may, from time to time, change his designation" (without any need for "[c]onsent of the Beneficiary") by "filing written notice thereof, signed and witnessed, with" the appropriate federal office prior to his death. *Id.* at 25.

2. In 1996, Warren Hillman designated respondent—then his wife—as the beneficiary of his FEGLIA life insurance. Pet. App. 4a; J.A. 31. In 1998, Warren and respondent divorced. Pet. App. 4a. Neither the divorce decree nor the associated property settlement agreement required Warren to maintain respondent as his FEGLI beneficiary. Br. in Opp. 8. In 2002, Warren married petitioner. Pet. App. 4a. Despite his divorce and subsequent marriage, Warren never changed his 1996 beneficiary designation. *Ibid.*

In 2008, Warren died. Petitioner (Warren's widow) and respondent (his ex-wife) filed claims for FEGLI benefits. Consistent with the 1996 beneficiary designation, benefits totaling $124,558.03 were paid to respondent. Pet. App. 4a.

3. In 2009, petitioner filed this civil action against respondent in a Virginia court, alleging that, under Section 20-111.1 of the Virginia Code, respondent was liable to her in an amount equal to the amount that respondent received from Warren's life insurance. Pet. App. 4a; see also J.A. 14-16 (Complaint) (alleging that respondent "had no right to receive the proceeds of her ex-husband's [FEGLI] policy" and that petitioner is the "rightful recipient," and seeking an order of payment of "funds [respondent] received from Decedent's FEGLI policy, or * * * the sum received by [respondent] as proceeds of Decedent's FEGLI policy").

a. Section 20-111.1(A) (Section A) provides that the "entry of a decree of annulment or divorce" automatically "revoke[s]" any "revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party." Va. Code Ann. § 20-111.1(A); see also *id.* § 20-111.1(B) (defining "death benefit" to include "payments under a life insurance contract"). "A death benefit prevented from passing to a former spouse by [that provision] shall [instead] be paid as if the former spouse had predeceased the decedent." *Id.* § 20-111.1(A).

The parties agree that FEGLIA preempts Section A. Pet. App. 8a. If Section A had not been preempted, it would have revoked Warren's then-existing FEGLI beneficiary designation upon the entry of his divorce decree. That revocation would then have entitled peti-

tioner, as Warren's widow, to obtain his life-insurance benefits under FEGLIA's order of precedence. See 5 U.S.C. 8705(a).

Section 20-111.1(D) (Section D) expressly provides for a back-up remedy in the event that federal law is found to preempt Section A:

> If [Va. Code Ann. § 20-111.1] is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under [§ 20-111.1] is personally liable for the amount of the payment to the person who would have been entitled to it were [§ 20-111.1] not preempted.

Va. Code Ann. § 20-111.1(D). Under that provision, respondent would be "personally liable" to petitioner in the amount of the payment that she received as the designated beneficiary of Warren's life insurance.[2]

b. The trial court granted summary judgment in favor of petitioner. Pet. App. 35a-58a. The court held that FEGLIA does not preempt Section D, which "imposes a constructive trust on death benefit proceeds when [Section A] is preempted." *Id.* at 36a. The court thus de-

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[2] A small minority of other States have adopted similar provisions. See Pet. Br. 21-23 & nn.7-8; see also Nev. Rev. Stat. Ann. § 111.781. In 2012, Virginia amended Section 20-111.1 to add Section E, which provides that decrees of divorce or annulment entered on or after July 1, 2012 must "contain the following notice in conspicuous, bold print: * * * If a party intends to revoke any beneficiary designation made payable to a former spouse following the annulment or divorce, the party is responsible for following any and all instructions to change such beneficiary designation * * * . Otherwise, existing beneficiary designations may remain in full force and effect." Va. Code Ann. § 20-111.1(E).

termined that respondent was liable to petitioner in the amount of $124,558.03—the total FEGLI benefits paid to respondent—plus interest. *Id.* at 33a.

4. a. The Virginia Supreme Court reversed and rendered judgment for respondent. Pet. App. 1a-31a. The court concluded that FEGLIA and its implementing regulations preempt Section D because that provision conflicts with federal law. *Id.* at 8a-14a.

The court explained that FEGLIA effectuates Congress's "inten[t] to grant an insured the right to name without restriction * * * the person who will receive the benefits from a FEGLI policy," such that those benefits "belong to the designated beneficiary to the exclusion of all others." Pet. App. 8a-9a; see *id.* at 12a. The court also explained that Section D's establishment of a state cause of action against a named beneficiary to whom FEGLI benefits have been paid creates "'a beneficiary interest' in the policy proceeds" for someone other than the designated beneficiary. *Id.* at 13a (quoting *Ridgway* v. *Ridgway*, 454 U.S. 46, 60 (1981)). That state-created interest in the proceeds, the court concluded, "nullifies the [insured's] choice and frustrates the deliberate purpose of Congress," which "did not intend merely for the named beneficiary in a FEGLI policy to receive the proceeds, only then to have them subject to recovery by a third party under state law." *Ibid.* (quoting *Wissner* v. *Wissner*, 338 U.S. 655, 659 (1950)).

b. Justice McClanahan (joined by Justice Millette) dissented. Pet. App. 16a-31a. The dissent opined that FEGLIA's "order of precedence" was enacted for "the purpose of providing 'administrative convenience' * * * in processing claims and distributing benefits," and that the federal interest in the FEGLI proceeds ends once

they have been "paid out to the designated beneficiary." *Id.* at 22a-23a (citation omitted); see *id.* at 24a, 26a.

SUMMARY OF ARGUMENT

Section D of the Virginia Code applies only in the event that Section A is "preempted by federal law," and aims to achieve precisely the same result that Section A otherwise would: a reshuffling of the order of insurance beneficiaries established by federal law. Section D treats the federally mandated beneficiary as a mere conduit for transfer of the FEGLI proceeds to someone lower down in the order of precedence for payment.

In *Wissner* v. *Wissner*, 338 U.S. 655 (1950), and *Ridgway* v. *Ridgway*, 454 U.S. 46 (1981), this Court held that federal insurance laws analogous to FEGLIA preempted state laws that attempted to create a new beneficiary interest by shifting insurance proceeds out of the hands of a named beneficiary. Such state laws, the Court explained, impermissibly "nullif[y] the [insured's] choice and frustrate[] the deliberate purpose of Congress," regardless of whether the order is "directed at the very money received from the Government or an equivalent amount." *Wissner*, 338 U.S. at 659.

Those decisions are controlling here. FEGLIA and its regulations establish that the benefit of the insurance policy "belong[s] to the named beneficiary and no other," *Ridgway*, 454 U.S. at 56, gives the insured the power to name the beneficiary, and forbids any general inquiry into the insured's intent. Section D second-guesses the insured's designation based on an assumption about his likely intent, enforces a policy determination that the named beneficiary is not "entitled" to receive the benefits, and effectively substitutes a new beneficiary in her stead. Va. Code. Ann. § 20-111.1(D).

Section D thus stands as an obstacle to the accomplishment of the full objectives of the federal law.

Petitioner tries to ease that conflict by emphasizing that Section D comes into play only after federal insurance proceeds have already been paid to the named beneficiary. *Wissner* and *Ridgway*, which disapproved state laws that operated similarly, foreclose that argument. Any other rule would permit States readily to evade federal preemption principles, and would destroy the certainty and uniformity that federal law guarantees by requiring insureds to attempt to ascertain how state law would affect the force of their beneficiary designations.

Petitioner also attempts to distinguish *Ridgway* by pointing to various differences between that case and this one—but none of those differences aids her. The existence of an express-preemption provision in FEGLIA "does *not* bar the ordinary working of conflict pre-emption principles or impose a special burden." *Arizona* v. *United States*, 132 S. Ct. 2492, 2505 (2012). The 1998 amendment to FEGLIA addressing divorce—which provides that a divorce decree requiring payment of insurance proceeds to a particular person will be honored if timely filed in the appropriate federal office—specifies the sole conditions under which benefits may be paid to someone other than the designated beneficiary, and shows that Congress understood that the effect of divorce on FEGLIA's rules should be addressed in FEGLIA itself. And *Ridgway* did not turn on the presence of an anti-attachment provision, or on the fact that the insurance scheme at issue benefited members of the military rather than federal employees.

Finally, petitioner's insistence that federal and state law serve the same purposes is unavailing. Even if the

purposes did align, conflict preemption would still exist because federal law gives benefits to one person and state law takes them away and gives them to someone else. But the purposes in fact are different, since federal law refuses to make the assumptions about the insured's intent on which the state law rests. Moreover, petitioner's contention that the Virginia law effectuates an insured's "true" intent is questionable. A divorced federal employee might want an ex-spouse to receive insurance benefits, and an insured with a different intent can readily act on it, particularly in light of OPM's warnings that divorce does not invalidate an existing beneficiary designation.

Because Section D conflicts with federal law, there is no need in this case to address FEGLIA's express-preemption provision, which states that "[t]he provisions of any contract under [FEGLIA] which relate to * * * payments with respect to benefits" preempt "inconsistent" state law "which relates to group life insurance." 5 U.S.C. 8709(d)(1). Were this Court to take judicial notice of the contract and consider the question, however, Section D would fall for this reason as well. The contract echoes the key provisions of the statute on the insured's power to designate a beneficiary and the named beneficiary's right to payment; Section D is inconsistent with those contractual provisions because its entire purpose and effect is to change what the contract requires and to deprive the contractual "beneficiary" of any benefit at all. Section D is also "related to" group life insurance, since it specifically mentions insurance and beneficiary designations, is concerned with entitlement to a beneficiary's proceeds, and applies only where Section A is preempted by federal law, which generally regulates group plans.

ARGUMENT

A. Section D Is Preempted Because It Conflicts With Federal Law

A state law is preempted to the extent that it conflicts with federal law. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."). Such conflict preemption occurs "where it is impossible for a private party to comply with both state and federal law" or where state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 372-373 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2500-2501 (2012).

Although federal law generally has "limited application * * * in the field of domestic relations," this Court, "even in that area, has not hesitated to protect * * * rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." *Ridgway* v. *Ridgway*, 454 U.S. 46, 54-55 (1981). Accordingly, state law "governing the economic aspects of domestic relations * * * must give way to clearly conflicting federal enactments" regarding such federal rights. *Ibid.*; see also, *e.g.*, *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581-583 (1979) (preempting state community property law as to federal retirement benefits, which "from their very inception have federal overtones"); *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

This Court has twice applied those conflict-preemption principles to prevent state law from effec-

tively changing the order of beneficiaries in a federal insurance scheme. See *Ridgway*, 454 U.S. at 54-60; *Wissner* v. *Wissner*, 338 U.S. 655 (1950). Application of the same principles in this case dictates the same result.[3]

1. Wissner *and* Ridgway *preempted state laws with the effect of changing the order of beneficiaries under federal insurance laws*

This Court's decisions in *Wissner* and *Ridgway* are part of a long line of cases that have deemed state law affecting control over federally created property rights to be an obstacle to federal law.[4] Both of those decisions involved federal insurance laws analogous to FEGLIA, and both rejected attempts under state law to reallocate insurance proceeds after they had already been paid to the federally mandated beneficiary.

In *Wissner*, which was decided just a few years before FEGLIA's 1954 enactment, the Court concluded that the National Service Life Insurance Act of 1940 (NSLIA), 38 U.S.C. 801 *et seq.*, preempted a state-law action by the insured's widow to recover a portion of the

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[3] OPM's views are entitled to at least "some weight," due to the agency's "unique understanding" of FEGLIA—which it has administered for more than 50 years as a party to the relevant insurance contract, see 5 U.S.C. 8716—and "attendant ability to make informed determinations about how state requirements may pose an 'obstacle'" to federal purposes. *Wyeth* v. *Levine*, 555 U.S. 555, 576-577 (2009) (quoting *Hines*, 312 U.S. at 67). This brief reflects OPM's consistent and long-standing position. See U.S. Amicus Br. at 7-20, *Metropolitan Life Ins.* v. *Christ*, 979 F.2d 575 (7th Cir. 1992) (Nos. 91-2515, 91-2516).

[4] See, *e.g.*, *Hisquierdo*, 439 U.S. at 581-583 (Railroad Retirement Act pensions); *Free*, 369 U.S. at 666 (United States savings bonds); *McCune* v. *Essig*, 199 U.S. 382, 390 (1905) (homesteads on public lands).

proceeds that had been paid to the insured's designated beneficiary (his mother). The "controlling section of the Act," the Court explained, provided that the insured "'shall have the right to designate the beneficiary or beneficiaries of the insurance'" and shall "'at all times have the right to change the beneficiary or beneficiaries.'" 338 U.S. at 658. The Court considered that provision clear in its "direct[ion] that the proceeds [of the insurance] belong to the named beneficiary and no other." *Ibid.* And the Court found it "plain" that ordering a portion of the proceeds to be transferred away from the mother to the plaintiff-widow would improperly "substitute[]" a new beneficiary for "the beneficiary Congress directed shall receive the insurance money." *Id.* at 658-659. Such a substitution, the Court determined, would impermissibly "nullif[y] the [insured's] choice and frustrate[] the deliberate purpose of Congress," regardless of whether the order was "directed at the very money received from the Government or an equivalent amount." *Id.* at 659.

In *Ridgway*, the Court applied *Wissner* to hold that the Servicemen's Group Life Insurance Act of 1965 (SGLIA), 38 U.S.C. 765 *et seq.* (now 38 U.S.C. 1965 *et seq.*), and its implementing regulations preempted a state-law "constructive trust imposed upon [life-insurance] policy proceeds" that had been paid to a beneficiary under that Act. 454 U.S. at 47. The Court relied on SGLIA's statutory "order of precedence," which provided for the insurance proceeds to be paid first to "such 'beneficiary or beneficiaries as the [insured] . . . may have designated.'" 454 U.S. at 52. Through that provision, the Court held, "Congress has spoken with force and clarity in directing that the pro-

ceeds belong to the named beneficiary and no other." *Id.* at 56 (quoting *Wissner*, 338 U.S. at 658).

The Court recognized a "small difference[] between the SGLIA and the predecessor NSLIA" considered in *Wissner*: SGLIA did not state that the insured was permitted to change his designated beneficiary "at all times" and "without the consent" of a prior beneficiary. *Ridgway*, 454 U.S. at 57. But the Court concluded that SGLIA's "unqualified directive to pay the proceeds to the properly designated beneficiary" under the statutory order of precedence "clearly suggests that no different result was intended by Congress." *Ibid.* And "any possible ambiguity," the Court determined, was "eliminated" by SGLIA's regulations, which gave the insured the right to change beneficiaries "at any time and without the knowledge or consent of the previous beneficiary." *Ibid.* SGLIA and its regulations thus gave the insured "an absolute right to designate the policy beneficiary" and conferred the "power to create and change a beneficiary interest," and those provisions preempted a state-law action for a constructive trust on the proceeds. *Id.* at 59-60.

2. Under Wissner *and* Ridgway, *Section D is preempted*

a. The statutory and regulatory provisions at issue in this case are strikingly similar to the beneficiary-related provisions considered in *Wissner* and *Ridgway*—indeed, the statute at issue in *Ridgway* was modeled on FEGLIA, see *Stribling* v. *United States*, 419 F.2d 1350, 1353 (8th Cir. 1969). FEGLIA's statutory "order of precedence" directs that FEGLI benefits "shall be paid" first to any beneficiary properly designated by the insured, and that the insured's widow is entitled to payment only "if there is no designated beneficiary." 5 U.S.C. 8705(a); see 5 U.S.C. 8705(c). OPM's implement-

ing regulations recognize the insured's associated "right" to designate a beneficiary "at any time without the knowledge or consent of the previous beneficiary." 5 C.F.R. 870.802(f).

The purpose of those provisions, as in *Wissner* and *Ridgway*, is to "direct[] that the proceeds belong to the named beneficiary and no other." *Ridgway*, 454 U.S. at 56 (quoting *Wissner*, 338 U.S. at 658); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006) (stating that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates" intent to "incorporate" them) (citation omitted). Except in narrow circumstances not applicable in this case, federal law provides the insured with freedom of choice in selecting a beneficiary and honors his choice scrupulously. That ensures certainty (because a properly filed beneficiary form cannot be trumped except by filing a particular kind of divorce order with the appropriate federal office) and uniformity (because federal law identifying the rightful beneficiary is the same for every federal employee across the country). It also ensures that the selected beneficiary actually benefits from receipt of the funds, without "nullif[ication]" or "substitu[tion]." *Wissner*, 338 U.S. at 658-659.

In directing that insurance proceeds belong to the "*named* beneficiary," *Ridgway*, 454 U.S. at 56 (emphasis added), Congress barred a free-floating inquiry into the insured's intent. Contra, *e.g.*, Pet. Br. 25, 52-53. A 1966 amendment to FEGLIA provides that "a designation, change, or cancellation of beneficiary in a will or other document * * * has no force or effect" if it does not meet the requirements for a beneficiary designation—that is, "a signed and witnessed writing" that is "execut-

ed and filed" in the appropriate federal office. 5 U.S.C. 8705(a). That amendment rejected *Sears* v. *Austin*, 292 F.2d 690 (9th Cir.), cert. denied, 368 U.S. 929 (1961), and other decisions that had held that the "intent of the insured should control" in a "battle * * * between possible beneficiaries." *Id.* at 692-695; see also S. Rep. No. 1064, 89th Cong., 2d Sess. 2 (1966) (Senate Report) (stating that "[t]he equities in *Sears* may have prompted the court of appeals to disregard the * * * general intent of the statute" and explaining Congress's intent "to state clearly that the order of precedence * * * shall prevail over any extraneous document"). Congress thereby protected insured employees from ambiguity and fraud, see, *e.g.*, H.R. Rep. No. 508, 89th Cong., 1st Sess. 6 (1965), and shielded designated beneficiaries from legal contests over their right to the money, see Senate Report 2.[5]

b. Like the state laws at issue in *Wissner* and *Ridgway*, Section D is preempted. Federal law declares that the benefit of the insurance policy "belong[s] to the named beneficiary and no other." *Ridgway*, 454 U.S. at 56. Section D, by contrast, takes the amount of the insurance proceeds away from a named beneficiary, on the ground that a "former spouse is not entitled" to them, and gives the money to somebody else. Va. Code Ann. § 20-111.1(D); see J.A. 14-15 (Complaint alleging respondent "had no right to receive the proceeds of her ex-husband's [FEGLI] policy" and that petitioner is the "rightful recipient"). Federal law puts the power to

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[5] As petitioner apparently concedes (Pet. Br. 19, 25), and as *Wissner* and *Ridgway* confirm, the objectives of federal law encompass far more than administrative convenience, which cannot explain why the employee's choice of beneficiary is given the highest precedence. See 5 U.S.C. 8705(a).

make or unmake a beneficiary designation in the insured's hands, and forbids reliance on other indicia of intent or any consideration of the equities if a valid beneficiary designation exists. See 5 U.S.C. 8705(a) and (c); 5 C.F.R. 870.802(f). Section D, however, overrides a valid designation based on a general assumption about the insured's likely intent and a general judgment that a current spouse should benefit. See Pet. Br. 21.

Section D thus represents a transparent attempt to "create * * * a beneficiary interest" in the policy proceeds that does not exist in federal law. *Ridgway*, 454 U.S. at 60. The cause of action that Section D creates is not based on any wrongdoing by the insured or the named beneficiary. There is nothing inherently wrongful about receipt of insurance proceeds by an ex-spouse, see *Connecticut Mut. Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 462-463 (1877), and respondent in this case is not alleged to have violated any promise, to have committed any tort, or to owe any debt, see *Ridgway*, 454 U.S. at 62-63 & n.12 (noting that because "[t]he record discloses no wrong on [the beneficiary's] part" it is "possible that depriving her of the proceeds would be as inequitable as any other result"). She is subject to this suit purely because Virginia believes that the federal order of precedence is incorrect and should be adjusted. Indeed, petitioner candidly admits as much. See Pet. Br. 56 (explaining that "the recipient is sued so as to confer the benefits of the insurance" on a different party); see also, *e.g.*, *id.* at 30.

In short, Section D treats the named beneficiary as a mere conduit for transferring the insurance proceeds to someone lower down in the federal order of precedence. That creates an intractable conflict with federal law. See *Ridgway*, 454 U.S. at 60; *Wissner*, 338 U.S. at 658-

659 (barring state-law suit against "the beneficiary Congress directed shall receive the insurance money" in order to replace her with a "substitute"); see also, *e.g.*, *McCune* v. *Essig*, 199 U.S. 382, 388-390 (1905) ("The words of the [federal] statute are clear, and express who in turn shall be its beneficiaries. The contention of appellant reverses the order of the statute, and gives the children an interest paramount to that of the widow through the laws of the State."). The conflict here is stark and arises directly from the text of FEGLIA. See *Wyeth*, 555 U.S. at 590-591 (Thomas, J., concurring in judgment); see also, *e.g.*, *Foster* v. *Love*, 522 U.S. 67, 71 (1997).

c. That conflict is not eased by the fact that Section D, rather than intercepting the payment of proceeds in the first place, creates a cause of action against the named beneficiary only after she has received the benefits and only "for the amount of the payment" received. Va. Code. Ann. § 20-111.1(D). *Wissner* found preemption even though the question was whether a judgment could be entered against the designated beneficiary for the amount of benefits that had been (and would be) paid to her. 338 U.S. at 658. As the Court explained, "[w]hether directed at the very money received from the Government [by the designated beneficiary] or an equivalent amount" in the form of a judgment against her, the operation of state law would "nullif[y] the [insured's] choice and frustrate[] the deliberate purpose of Congress." *Id.* at 659; see *id.* at 658-659. And *Ridgway* found preemption even though the question was whether a constructive trust could be imposed on insurance proceeds that had already been distributed. See *Ridgway*, 454 U.S. at 47, 49-50, 60. This Court has reached the same conclusion in a number of other cases involving

federal rights. See, *e.g.*, *Free*, 369 U.S. at 669 (holding that permitting state-law suit against heir to federal bonds for "half of the value of the bonds" would "render[] the award of title meaningless"); *Hisquierdo*, 439 U.S. at 588-589; *McCune*, 199 U.S. at 388-390; see also *Boggs* v. *Boggs*, 520 U.S. 833, 854 (1997) (explaining that "[i]t does not matter that respondents have sought to enforce their rights only after the [ERISA] benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits").

Any other result would permit States readily to evade federal preemption principles. See *Wos* v. *E.M.A*, No. 12-98 (Mar. 20, 2013), slip. op. 7-8 ("Pre-emption is not a matter of semantics. A State may not evade the preemptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect."); *Free*, 369 U.S. at 669 (preempting state law that "frustrate[d] the parties' attempt to use the [federal] bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased coowner"). Indeed, the Virginia statute does not hide its evasive intent. As petitioner explains, Section D was enacted as a way of circumventing this Court's decision in *Egelhoff* v. *Egelhoff*, 532 U.S. 141 (2001), which held that ERISA preempted a state law analogous to Section A. See *id.* at 146-152; Pet. Br. 5; J. Rodney Johnson, *Wills, Trusts, and Estates*, 43 U. Rich. L. Rev. 435, 441 (2008); Unif. Probate Code § 2-804, commentary (amended 2010). Section D thus applies *only* if Section A is "preempted by federal law." Va. Code Ann. § 20-111.1(D). And whereas Section A would revoke a benefi-

ciary designation naming an ex-spouse, Section D aims to bring about the same economic effect.

If a State could avert any conflict with federal law by whisking federal benefits away from the beneficiary after they have been paid, then a State could transfer the proceeds of a federal insurance policy to anyone at all. In theory, a State could even enact a law requiring a beneficiary to give some or all of the insurance proceeds directly to the State. See 5 U.S.C. 8705(d) (providing that unclaimed proceeds escheat to federal fund under certain circumstances); *United States* v. *Oregon*, 366 U.S. 643, 649 (1961). Like Section D itself, such laws would drain the FEGLIA order-of-precedence provision of its force. See *Wos*, slip. op. 8-9; *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004).

Permitting States to use devices like Section D would also place a heavy burden on FEGLI insureds, who would need to familiarize themselves with state laws affecting their beneficiary designations. An employee who moves from State to State would have to undertake the analysis anew with each new location. Insureds would also have to stay up to date on changes in state law; after all, Section D was enacted ten years after Mr. Hillman designated respondent as his beneficiary. See J.A. 8; Va. Code Ann. § 20-111.1. And insureds might even have to attempt to ascertain and apply the correct choice-of-law rules—where, for instance, an employee is separated from his current spouse, who lives in a different State than he does, while his ex-spouse lives in yet another State. See Restatement (Second) Conflict of Laws §§ 6, 192 & cmt. d, 221 (1971). Forcing insureds to shoulder such a burden would undermine the certainty and uniformity that federal law guarantees. Cf.

Egelhoff, 532 U.S. at 147-150 & n.3 (noting that revocation-on-divorce statute placed a "burden" on administrators "exacerbated by * * * choice-of-law problems," thus "pass[ing]" the "costs of delay and uncertainty * * * on to beneficiaries"); see also *Boggs*, 520 U.S. at 850-851, 853-854; *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350-351 (2001).

3. Petitioner's contrary arguments are without merit

a. Petitioner's efforts to distinguish *Ridgway* and *Wissner* are unavailing.

First, petitioner points out (Br. 45-47) that FEGLIA has an express preemption provision, while the statutory schemes at issue in *Ridgway* and *Wissner* did not. As this Court has explained, however, "the existence of an express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." *Arizona*, 132 S. Ct. at 2504-2505 (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869-872 (2000)) (internal quotation marks omitted); see *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 65 (2002). That rule is especially apt where, as here, Congress mandates that the provisions of a relevant contract "shall supersede and preempt" state law. 5 U.S.C. 8709(d)(1). Such a provision cannot be read to deprive FEGLIA *itself* of any preemptive effect whatever.

Second, petitioner argues (Br. 42-44) that FEGLIA is distinct from both SGLIA and NSLIA due to the 1998 amendment that addresses whether a divorce decree can supersede a beneficiary designation. See 5 U.S.C. 8705(e) (providing that "[a]ny amount which would otherwise be paid to a person determined under the order of precedence * * * shall be paid * * * to another

person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation," so long as the decree "is received, before the date of the covered employee's death," in the appropriate federal office). But that amendment does not aid petitioner's cause; rather, by specifying the precise (and sole) conditions under which benefits may be paid to someone other than the designated beneficiary, it cements the conclusion that FEGLIA preempts Section D. Congress specifically considered whether and how a divorce decree ought to affect a beneficiary's right to the insurance proceeds, and gave effect to such a decree only under narrow circumstances that do not apply in this case.[6] That reflects Congress's understanding that the application of FEGLIA's rules in the context of marital dissolution is a matter to be addressed in FEGLIA itself. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001); *Kennedy* v. *Plan Adm'r*, 555 U.S. 285, 301-302 (2009); *Hisquierdo*, 439 U.S. at 584-587. It also demonstrates that the mere *existence* of a divorce decree cannot alter a named beneficiary's right to enjoy the benefit of the proceeds. See 5 U.S.C. 8705(e); cf. 5 U.S.C. 8705(a) (stating that "designation, change, or cancellation of beneficiary in a will or other document not * * * executed and filed has no force or effect"); *Mansell* v. *Mansell*, 490 U.S. 581, 588-589 (1989).

Third, petitioner emphasizes (Br. 38-41) that the statutory scheme at issue in *Ridgway* contained an anti-attachment provision—prohibiting any "attachment,

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[6] Congress acknowledged that, absent the exception, federal law preempted enforcement of such decrees. See H.R. Rep. No. 134, 105th Cong., 1st Sess. 2 (1997) (stating that the conclusion that "divorce decrees * * * do not affect the payment of life insurance proceeds" was "required by 5 U.S.C. § 8705").

levy, or seizure by or under any legal or equitable process whatever," 38 U.S.C. 1970(g)—that lacks any analogue in FEGLIA. That fact does not distinguish *Ridgway* or do anything to diminish the conflict between FEGLIA and Section D. *Ridgway* held that SGLIA's anti-attachment provision preempted state constructive-trust law, because imposing a constructive trust would amount to "a forbidden 'seizure' of [insurance] proceeds." *Ridgway*, 454 U.S. at 60. But it also held that SGLIA's provision governing the order of precedence, which is virtually identical to the relevant FEGLIA provision, was independently sufficient to preempt the state law at issue. See *id.* at 55-60 (noting that *Wissner* also described anti-attachment provision "as an independent ground for the result reached"); see also *Wissner*, 338 U.S. at 658, 659. Even in the absence of the anti-attachment provision, then, *Ridgway* (and *Wissner*) would have been decided the same way. See *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 346 n.4 (1986).

In any event, the absence of an anti-attachment provision in FEGLIA does not suggest that any state law survives preemption so long as it operates only after the federally mandated beneficiary has already received the insurance proceeds. To be sure, Congress permitted taxation of FEGLI proceeds, and also permitted creditors with a contract or tort claim against the beneficiary to reach the proceeds as part of any recovery.[7] Compare

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[7] The FEGLI insurance policy therefore permits application of state tax law; it does not, despite petitioner's contrary statements (Pet. Br. 68), endorse "post-distribution equitable remedies" more generally. Petitioner's argument (Br. 69 n.28) that Section D amounts to a tax law is meritless, since it only creates a private cause of action.

Hisquierdo, 439 U.S. at 583-584. If the proceeds are used to satisfy a debt or some other obligation owed by the beneficiary, then she is "benefiting" from her receipt of them, even if she would prefer not to use them in that fashion. See, *e.g.*, *Free*, 369 U.S. at 669-671. But Congress's tolerance for those kinds of claims does not also signal tolerance for a specially created cause of action, not premised on the beneficiary's own conduct, that simply shifts the proceeds to a person who the State thinks should have received them in the first place. Congress did not need to enact an anti-attachment provision in order to bar such a cause of action; it is preempted by the provisions that establish the insured's right to select his beneficiary and the beneficiary's right, above all others, to payment. See *Ridgway*, 454 U.S. at 56.

Fourth, and relatedly, petitioner attempts (Br. 57) to distinguish between the constructive-trust action at issue in *Ridgway* and the cause of action created by Section D, which petitioner says makes her only a "general creditor" of the beneficiary. But this, too, is a distinction without a difference. See Pet. App. 36a-37a. A constructive trust captures specific money or property in the beneficiary's hands and creates a claim superior to creditors. The Virginia law manufactures a claim that focuses on the amount of the insurance proceeds rather than the proceeds themselves, and that may have parity with creditors' claims against the beneficiary. See generally Restatement of Restitution § 160 (1937) (Restatement); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 212-216 (2002). Thus, the Virginia law leaves open the possibility that a sufficiently solvent beneficiary will pay the exact amount she received in FEGLIA proceeds by using different money

that she already had in her possession. But this Court has already ruled that a state-law claim that seeks to adjust the order of precedence in a federal insurance scheme frustrates Congress's purpose "[w]hether directed at the very money received from the Government or an equivalent amount." *Wissner*, 338 U.S. at 658-659; see also, *e.g.*, *Boggs*, 520 U.S. at 854. The Virginia law also leaves open the possibility that, if the beneficiary has limited funds and many creditors, the person Virginia would have preferred to receive the insurance proceeds in the first instance will not obtain the full amount. See Restatement § 160. But that does not change the fact that *any* sum recovered under Section D is a naked transfer away from the federally mandated beneficiary, based on a policy judgment that diverges from the judgment that federal law has already made.

Fifth, petitioner suggests (Br. 34-35, 48) that the purposes of the statute at issue in *Ridgway* are significantly different than the purposes of FEGLIA, on the ground that Congress sought in SGLIA to give extraordinary protections to members of the military to keep up their morale. *Ridgway* did not rest on the conclusion that morale-building was a critical congressional purpose, however; the Court noted that effect only in confirming the constitutional "authority of Congress to control payment of the proceeds of SGLIA policies" as "within the congressional powers over national defense." *Ridgway*, 454 U.S. at 56-57 (quoting *Wissner*, 338 U.S. at 660-661).

In addition, FEGLIA equally serves the overarching goal of improving morale. Federal employees "deliver the mail, fight forest fires, construct public buildings" and "engage in countless other tasks which affect virtually every phase of the country's well-being," *Amell* v.

United States, 384 U.S. 158, 162 (1966), and providing life-insurance benefits helps the government hire and retain able employees to carry out those functions.[8] See, *e.g.*, S. Rep. No. 1654, 83d Cong., 2d Sess. 2, 7-8 (1954) (noting goal to "assist the employee in increasing his morale and work productivity"). To the extent that Congress believed that members of the military were deserving of special solicitude, it expressed that belief though the anti-attachment provision it added to SGLIA in 1970. In both statutes, however, Congress put in place requirements for the payment of beneficiaries that preclude states from reshuffling the beneficiary list to suit their own preferences.

b. Finally, petitioner argues (Br. 19, 30, 35, 52-53) that Section D is not preempted because it furthers the objectives of federal law. In petitioner's view, federal law has the purpose of carrying out the insured's intent, and the Virginia law simply effectuates what must necessarily be the intent of every person who has failed to update his beneficiary designation after a divorce: to keep the proceeds away from an ex-spouse.

That argument lacks merit. Even if the federal and state law did serve the same purposes, that would not obviate the conflict between them, since federal law directs the benefits to "the named beneficiary and no other," but Section D "substitutes" in a different beneficiary. *Wissner*, 338 U.S. at 658-659; see, *e.g.*, *Crosby*, 530 U.S. at 379 (stating that "[t]he fact of a common end

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[8] Some members of the military are eligible for FEGLIA insurance for a limited period. See 5 U.S.C. 8706(d) (permitting federal employee who leaves employment for military service to elect FEGLI coverage); see also 5 U.S.C. 8702(c), 8714a(b)(1), 8714b(b)(1); 10 U.S.C 101(a)(13), 1580(a) (governing FEGLIA insurance for employees in combat zones).

hardly neutralizes conflicting means"); *Charleston & W. Carolina Ry.* v. *Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) (stating that "a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go"). But even if the purposes of federal law and the Virginia law have similarities at some level of generality, they are not the same. Section D takes the money away from the named beneficiary on the assumption that the insured's intent is something other than what is written down in the beneficiary designation, while federal law privileges the named beneficiary by giving effect to intent expressed through a proper written designation rather than assuming a contrary intention.

In any event, petitioner errs in asserting that the Virginia law necessarily effectuates the insured's "true" intent. A divorced federal employee might want his ex-spouse to receive insurance proceeds for a number of reasons—out of a sense of obligation, remorse, or continuing affection, or to help care for children of the marriage that remain in the ex-spouse's custody. And the presumption that an insured has purposefully left such a beneficiary designation in place is strengthened by OPM's statement to employees to "consider completing a new designation form" to "remove a former spouse" since "[a] divorce does not invalidate a designation that names [the insured's] former spouse as beneficiary." *Handbook* 160, 164. It is also strengthened by the ease with which an insured can terminate an existing FEGLI designation. See *id.* at 167; *Kennedy*, 555 U.S. at 302-304. Federal law treats failure to take that action as intentional rather than inadvertent, and thereby bars the "chang[e in] the default rule," Pet. Br. 53, that has

been enacted by Virginia and a small number of other States.[9]

That conclusion does not foreclose a State from taking *any* steps to address the issue with which Section D is concerned. For instance, there is no conflict between federal law and a state law requiring that all parties be reminded during divorce proceedings to consider revisiting their insurance-beneficiary designations. Virginia has recently enacted just such a provision, mandating in a 2012 amendment to Section 20-111.1 that every divorce decree "contain the following notice in conspicuous, bold print: * * * If a party intends to revoke any beneficiary designation made payable to a former spouse following the annulment or divorce, the party is responsible for following any and all instructions to change such beneficiary designation * * * . Otherwise, existing beneficiary designations may remain in full force and effect." Va. Code Ann. § 20-111.1(E). Such a notice serves to buttress, rather than undermine, federal law directing insurance proceeds to the named beneficiary.

B. Section D Is Inconsistent With the Governing Contract

FEGLIA's express-preemption provision establishes that "[t]he provisions of any contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State * * * which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual

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[9] To be sure, Section D and similar laws do not exclude the possibility that an insured can direct benefits to an ex-spouse by redesignating that person after the divorce has become final. See Pet. Br. 53. But a state law is not "saved from pre-emption simply because it is * * * a default rule." *Egelhoff*, 532 U.S. at 150.

provisions." 5 U.S.C. 8709(d)(1). The Court need not reach the issue of express preemption in this case. The conflict-preemption analysis is straightforward—and this Court has previously resolved similar cases on conflict-preemption grounds, even in the presence of an express-preemption provision like the one at issue here, see *Boggs*, 520 U.S. at 841. Moreover, the court below did not pass on the express-preemption issue, see Pet. App. 13a n.3, and the contract between OPM and MetLife governing payment of FEGLI benefits is not in the record (although the United States sought to lodge the contract with the Court at the certiorari stage).

Should the Court take judicial notice of the contract (Resp. Br. 52-53) and address express preemption, however, then Section D must fall on that ground as well—even under a "modest reading" of Section 8709(d)(1). *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006).[10] Section D relates to group life insurance, and it is inconsistent with the contract provisions granting beneficiary-designation rights to insureds and providing for payment in an "order of precedence" that privileges a designated beneficiary above a widow.

By using the broad phrase "relates to," Section 8709(d)(1) describes state laws that have a "connection

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[10] In *Empire*, this Court gave a "modest reading" to a preemption provision that "renders preemptive contract terms in health insurance plans, not provisions enacted by Congress." *Id.* at 697-698. That provision sweeps more broadly than Section 8709(d)(1), since it does not require any inconsistency between the contract provisions and relevant state law, see 5 U.S.C. 8902(m)(1), and *Empire* addressed a subject-matter jurisdiction question. A similarly "modest reading" may therefore not be warranted here. In any event, "the plain wording of the clause * * * necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma*, 537 U.S. at 62-63.

with, or reference to" group life insurance. *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (emphasis and citation omitted); see also, *e.g.*, *Egelhoff*, 532 U.S. at 146-147. Section D is not a law of general applicability with only a "tenuous, remote, or peripheral" link to group life insurance. *Rowe*, 552 U.S. at 375. It mentions "payments under a life insurance contract" and "beneficiary designation[s]" specifically, Va. Code Ann. § 20-111.1(A) and (B), and goes straight to the heart of what group life insurance is most essentially about: benefiting a surviving beneficiary. Section D addresses "entitle[ment]" to life insurance proceeds, shifting them from one person to another, and subjecting the named beneficiary to a lawsuit in the process. *Id.* § 20-111.1(D). It also applies only where "federal law" preempts the beneficiary-revocation provision found in Section A, see *ibid.*, thus apparently contemplating application to the kinds of *group* plans that federal law regulates. The connection between Section D and group life insurance is manifest. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985).[11]

Section D is also "inconsistent with the contractual provisions" governing "payments with respect to benefits." 5 U.S.C. 8709(d)(1). The relevant contractual provisions mirror the key provisions of FEGLIA itself: the contract provides that the employee has the right to designate a beneficiary and to "change his designation" by filing the appropriate papers; that "payment shall be

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[11] The legislative history of Section 8709(d)(1) does not dictate a different conclusion. See Pet. Br. 66-67. Regardless of what problem the provision was meant to solve, Congress chose "expansive" language, *Egelhoff*, 532 U.S. at 146, and that language governs, see, *e.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

made" to the designated beneficiary; that a widow is entitled to benefits only "[i]f, at the death of the Employee, there be no designated Beneficiary"; and that payment to a "claimant * * * equitably entitled" to payment may be made only if no one in the order of precedence claims the money for several years. Contract 18, 25-26.[12]

Section D runs afoul of those provisions for the same reasons that it conflicts with federal law: it effectively reorders the list of beneficiaries so that the insurance proceeds are enjoyed by the widow *instead of* the named beneficiary, and it deprives the insured of the power to decide who will benefit from the insurance policy. To be sure, as petitioner points out (Br. 63-64), Section D has that effect only after the payment required by the contract has already been made. But the Virginia law nevertheless seriously undermines the contract, because it attempts to change what the contract requires and to deprive the contractual "beneficiary" of any benefit at all.

In an effort to show that the contract is compatible with "post-distribution equitable remedies," petitioner points (Br. 67-69) to a provision stating that beneficiaries are not relieved of their obligation to comply with state tax laws. But that provision simply reflects that FEGLIA does not have an anti-attachment provision protecting beneficiaries from any and all claims to a portion of their proceeds. It does not signify that the contract is consistent with a state law that automatically

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[12] The contract does not include several current provisions of FEGLIA that are not directly applicable to the case at hand—for instance, the 1998 amendment directing benefits to a person named in a divorce decree. See 5 U.S.C. 8705(e).

strips away a beneficiary's payment based on a policy judgment that someone else should have received it.

CONCLUSION

The judgment of the Virginia Supreme Court should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys

ELAINE KAPLAN
General Counsel
R. ALAN MILLER
Associate General Counsel
SUSAN G. WHITMAN
Deputy Assistant General Counsel
JAMES MUETZEL
Senior Attorney
Office of Personnel Management

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

JACQUELINE HILLMAN,
Petitioner,

v.

JUDY A. MARETTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE ASSOCIATION OF FEDERAL HEALTH ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID M. ERMER
ERMER LAW GROUP, PLLC
1413 K St., NW
6th Floor
Washington, D.C. 20005
(202) 833-3400
dermer@ermerlaw.com

ANTHONY F. SHELLEY
Counsel of Record
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W.
Suite 900
Washington, D.C. 20005
(202) 626-5800
ashelley@milchev.com

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INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Federal Health Organizations ("AFHO") is an organization of entities that serve as carriers of health benefit plans under the Federal Employees Health Benefits Program ("FEHB Program"). Collectively, the plans of AFHO's member carriers provide health benefits to over 75% of the roughly eight million federal and postal employees, annuitants, and eligible dependents who receive health coverage under the FEHB Program.

Health benefit plans under the FEHB Program are governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14. In many important aspects, FEHBA is substantially similar to the Federal Employees' Group Life Insurance Act ("FEGLIA"), 5 U.S.C. §§ 8701-16 – the statute governing the Federal Employees' Group Life Insurance Program ("FEGLI Program") that is at issue in this case. As their names imply, both FEGLIA and FEHBA are meant to create insurance products for federal employees (and, in FEHBA's case, for eligible annuitants and dependents). 5 U.S.C. §§ 8701(a), 8702, 8901(1), (3), (5), 8905. Under both FEGLIA and FEHBA, the same federal agency – the U.S. Office of

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, and its counsel, made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent have consented in writing to the filing of this brief, and those consents accompany this brief.

Personnel Management ("OPM") – contracts with private carriers to create the insurance products offered. *Id.* §§ 8709(a), 8902(a). Under both programs, the federal government pays a portion of the premium cost and the enrollee pays the remainder. *Id.* §§ 8707-08, 8906. Under both FEGLIA and FEHBA, government and federal employee contributions are deposited into special accounts in the U.S. Treasury and then used to pay the carriers' premiums. *Id.* §§ 8714, 8909.

Perhaps most important for present purposes, FEGLIA and FEHBA contain similar express preemption provisions, both of which give preemptive force, in certain circumstances, to the terms of OPM's contracts with the insurance carriers. *Id.* §§ 8709(d), 8902(m)(1). Other federal insurance programs have similar preemption provisions. *Id.* § 8959 (enhanced dental benefits for federal employees); *id.* § 8989 (enhanced vision benefits for federal employees); *id.* § 9005(a) (federal long-term care insurance).

The issue presented in this case is whether FEGLIA (or the OPM contract or regulations created pursuant to FEGLIA) preempts the cause of action provided in Va. Code § 20-111.1(D). AFHO and its members have a strong interest in the manner in which express preemption provisions of the sort at issue in this case are interpreted and in preemption generally under federal insurance programs. AFHO and its members support Respondent's and the United States' implied preemption arguments in this case but file this *amicus* brief to address two issues that have received less attention from the parties – express preemption and the operation of presumptions in

the preemption context generally. AFHO and its members believe that there should be no presumption against preemption in this case and that, in any event, FEGLIA's preemption provision expressly preempts the state law at issue and, therefore, that the judgment of the Supreme Court of Virginia should be affirmed.

SUMMARY OF ARGUMENT

A. A presumption against preemption is inappropriate in this case. It is true that when "Congress legislate[s] . . . in a field which the States have traditionally occupied," the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted). However, such a presumption against preemption should not attach here because this case involves uniquely federal interests. It involves an insurance program for federal employees that is created by a federal government contract and paid for, in part, with federal funds. When such uniquely federal interests are at stake, there is no presumption against preemption.

B. Va. Code § 20-111.1(D) is expressly preempted under FEGLIA's preemption provision, 5 U.S.C. § 8709(d). Congress stated in the preemption provision that state laws would be preempted by the provisions in OPM's life insurance contract with the carrier whenever three conditions were met: (1) the OPM contract provisions "relate to the nature or extent of coverage or benefits (including payments with respect to benefits)"; (2) the state law "relates to

group life insurance"; and (3) the state law "is inconsistent with the contractual provisions." *Id.* These criteria are all met in this case. The contract contains specific, relevant provisions governing the payment of benefits, with those provisions unambiguously stating that benefits are to be paid to the federal employee's beneficiary of record (if one has been designated) and that such beneficiary can be changed only through a written notice filed with the government employing office. These provisions plainly "relate to" the payment of benefits; indeed, that is their sole purpose. Next, Va. Code § 20-111.1(D) "relates to group life insurance." Its only purpose is to redirect life insurance benefits (and other death benefits) from the designated beneficiary to another person. Finally, Va. Code § 20-111.1(D) is "inconsistent" with the contract provisions. The latter require that benefits go to the designated beneficiary and require that any beneficiary change be in writing and filed with the government; the former would give those benefits to someone other than the designated beneficiary and would effectively permit beneficiary changes by default. Nothing more is required for express preemption to occur.

ARGUMENT

AFHO supports the implied preemption analysis of Respondent and the United States. This *amicus* brief focuses largely on another issue lurking in this case: express preemption under FEGLIA, which is an independently dispositive issue. AFHO is mindful that both the United States and Petitioner suggest that this case should not be decided on the basis of FEGLIA's express preemption provision, and that the Supreme Court

of Virginia did not decide the case on that basis. However, the Solicitor General has lodged the relevant FEGLI Program contract with the Court (with the contract then being the touchstone for express preemption under FEGLIA); and the parties in their merits briefs have addressed express preemption, albeit as secondary to implied preemption. Further, in cases involving situations where Congress has included an express preemption provision, the Court has sometimes preferred to start its analysis there. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."); *e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867 (2000); *but cf. Boggs v. Boggs*, 520 U.S. 833, 841 (1997) (finding it unnecessary to address express preemption because conflict preemption "suffices to resolve the case").

Given the prospect that the Court could here choose to reach express preemption, AFHO addresses in full the FEGLIA preemption analysis that properly should apply. AFHO's members' interests, again, are most likely to be impacted by a ruling from the Court based on FEGLIA's express preemption provision (due to the provision's resemblance to FEHBA's preemption section).

Before turning to the application of FEGLIA's express preemption provision, we address presumptions in the preemption context – an issue important to both implied and express preemption.

A. There Should Be No Presumption Against Preemption in This Case Because Uniquely Federal Interests Are at Stake

Petitioner repeatedly argues that "there is a strong presumption against preemption of domestic relations laws." Petitioner's Br. at 10; *see also id.* at 15, 16-19, 25, 64, 70. AFHO agrees that such a presumption might come into play if Congress were to enact a law meant to regulate domestic relations generally – for example, a federal nationwide rule dictating how long a couple must be separated before they can divorce. But a presumption against preemption is inappropriate when Congress legislates in an area laden with federal interests, including the government's interests in federal insurance programs and in the federal employees who use them. This Court has stated:

> Notwithstanding the limited application of federal law in the field of domestic relations generally, . . . this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights.

Ridgway v. Ridgway, 454 U.S. 46, 54 (1981).

It is therefore not surprising that this Court has repeatedly found state domestic relations laws to be preempted when those laws sought to interfere with a federal benefits program. *See id.*; *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *Wissner v. Wissner*, 338 U.S. 655 (1950); *see also*

Wos v. E.M.A., 568 U.S. ___ (2013) (slip op. at 11) ("A statute that singles out Medicaid beneficiaries . . . cannot avoid compliance with the federal anti-lien provision merely by relying upon a connection to an area of traditional state regulation.").

Although the cases just cited did not explicitly discuss the impact that federal interests had on any presumption relating to preemption, this Court has elsewhere elucidated the concept, settling on the terminology "uniquely federal interests" to describe the category of federal interests that can affect any presumption against preemption. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). We first summarize the Court's jurisprudence on uniquely federal interests and its application to the FEGLI Program, and then review the Court's instruction that the presumption against preemption is negated where – as here – uniquely federal interests are at stake.

In *Boyle*, the Court analyzed whether federal common law governed a negligence action against a government contractor. Unlike in this case, in *Boyle* there was no express preemption provision; nor was there a federal statute or regulation that might have led to implied preemption. Nonetheless, this Court in *Boyle* held that federal common law would displace state law if two conditions were met. First, the case must implicate "uniquely federal interests." *Id.* at 504. Second, there must be a "significant conflict . . . between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (internal quotation marks and citation omitted).

In *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), this Court returned to the concept of uniquely federal interests, considering whether *Boyle* applied to a reimbursement dispute between a carrier and an enrollee under the FEHB Program. Both this Court and the Second Circuit (whose decision was affirmed) held that the uniquely-federal-interests prong is satisfied in such reimbursement cases. This Court noted that the Second Circuit "acknowledged . . . the case involved distinctly federal interests" (*id.* at 688 (citing *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 150 (2d Cir. 2005) (Sack, J., concurring))), and then the Court in its own right stated that "distinctly federal interests are involved" in part because the insurance contract "is negotiated by a federal agency and concerns federal employees." *Empire*, 547 U.S. at 696. The dissent also found that uniquely federal interests were involved, in part because of the federal interest in interpreting the OPM insurance contract uniformly. *Id.* at 709, 711 (Breyer, J., dissenting).

Ultimately, this Court in *Empire* found that *Boyle* did not apply, but only because the second prong of the test – the significant conflict prong – had not been met. *Id.* at 693; *see also Empire*, 396 F.3d at 142 (Sotomayor, J.) ("We recognize the possibility that at a later stage in the proceedings, a significant conflict might arise between New York state law and the federal interests underlying FEHBA, such that the dispute would satisfy both prongs of *Boyle*.").

As with the FEHB Program at issue in *Empire*, there can be no doubt that uniquely federal

interests are present in this case. The FEGLI Program is a federal insurance program for federal employees, created through a contract with a federal agency, and financed with funds from the U.S. Treasury that, in part, were contributed by the federal government. *See Ridgway*, 454 U.S. at 57 ("The federal interest is especially strong because a substantial share of the proceeds of an SGLIA policy may be attributable to general tax revenues.").

In this case, there is no need to undertake a *Boyle* analysis to determine if federal common law applies. Here, federal statutory law can apply as a result of FEGLIA's express preemption provision or as a result of FEGLIA's substantive provisions impliedly preempting the state law. Nonetheless, *Boyle* offers an important lesson regarding presumptions in preemption cases that, like this one, involve uniquely federal interests. When speaking of the degree of conflict that must exist between the federal policy and the operation of state law, this Court stated:

> The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates "in a field which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230. Or to put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.

Boyle, 487 U.S. at 507-08.

If anything, the Court should even more readily reject a presumption against preemption in this case than in *Boyle*, because Congress included an express preemption provision in FEGLIA. That provision, as noted later, *see infra* p. 20 & n.5, uses broad wording, and is in some ways even broader than the preemption section contained in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), which the Court historically has characterized as "deliberately expansive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). If uniquely federal interests without a clear expression of broad Congressional intent favoring preemption (as in *Boyle*, where there was no relevant preemption provision) were sufficient to nullify a presumption against preemption, then uniquely federal interests *plus* the clear Congressional expression (as in FEGLIA) surely should negate any presumption against preemption.[2]

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[2] A presumption against preemption might also be inappropriate if the federal agency charged with administering the statute expresses its opinion on the subject. Courts have often deferred – under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), or otherwise – to an agency's view on whether a particular state law falls within the scope of an express preemption provision. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996); *id.* at 505-06 (Breyer, J., concurring in part); *Health Maint. Org. of N.J., Inc. v. Whitman*, 72 F.3d 1123, 1130 (3d Cir. 1995); *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717 (2d Cir. 1993), *rev'd in non-relevant part, N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *Blue Cross & Blue Shield of Fla., Inc. v. Dep't of Banking & Fin.*, 791 F.2d 1501, 1506 (11th Cir. 1986).

The conclusion that no presumption against preemption should apply in this case is also supported by the decision in *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). In *Buckman*, this Court found the plaintiffs' claims preempted by the Federal Food, Drug, and Cosmetic Act, which is administered by the Food and Drug Administration ("FDA"). *Id.* at 343. The case involved certain medical devices that allegedly caused harm to plaintiffs. Plaintiffs theorized that the manufacturer of the devices and the manufacturer's consultant misrepresented certain facts to the FDA, which would not have approved the devices were it not for the misrepresentation. *Id.* at 346-47.

Based on this alleged misrepresentation, the "[p]laintiffs sought damages from [the consultant] under state tort law." *Id.* at 343; *see also id.* at 346-47. "[T]here is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." *Wos v. E.M.A.*, 568 U.S. ___ (2013) (slip op. at 11) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). Yet, in *Buckman*, this Court held that a presumption against preemption did not apply. The reason was the manner in which the plaintiffs were attempting to use the state tort law – namely, as a mechanism for alleging that a fraud had been perpetrated on the FDA. The Court explained:

> Policing fraud against federal agencies is hardly "a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947), such as to warrant a presumption against finding

> federal pre-emption of a state-law cause of action. To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law. *Cf. Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-505, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988).

Buckman, 531 U.S. at 347; *see Wos v. E.M.A.*, slip op. at 11 (refusing to apply the presumption against preemption because the state law was "not an exercise of the State's general authority to regulate its tort system"); *see also Rice*, 331 U.S. at 230 (the presumption against preemption will not attach when "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject") (citations omitted).

As with the state law at issue in *Buckman*, Va. Code § 20-111.1(D) should not trigger a presumption against preemption. We assume for the sake of argument that subsection (A) of the statute – which voids pre-divorce beneficiary designations for death benefits – is a domestic relations law. However, subsection (D) of the statute has less to do with domestic relations and more to do with attempting to override federal law. It applies only if subsection (A) of the statute "is preempted by federal law with respect to the payment of any death benefit," and its sole purpose is to avoid the effects of that preemption. Va. Code § 20-111.1(D). And, in this case, the federal statute that Va. Code § 20-111.1(D) seeks to defeat does not

deal with death benefits for the general public, but rather creates a federal life insurance program for federal employees that is funded in part with federal dollars. Federally-sponsored insurance for federal employees "is hardly 'a field which the States have traditionally occupied.'" *Buckman*, 531 U.S. at 347 (citation omitted).[3]

B. FEGLIA's Preemption Provision, 5 U.S.C. § 8709(d), Expressly Preempts Va. Code § 20-111.1(D)

FEGLIA's preemption provision states:

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is

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[3] On a somewhat related note, to the extent the Court chooses to decide the case based on implied rather than express preemption, it should reject Petitioner's assertion that "the existence of an express preemption provision creates a presumption against implied preemption." Petitioner's Br. at 47. At least since *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (cited in Petitioner's Br. at 13, 45-46), the Court has made clear that "ordinary pre-emption principles apply" even when "Congress include[s] an express pre-emption provision in the" relevant statute. *Buckman*, 531 U.S. at 352 (citing *Geier*, 529 U.S. at 869); *see also Boggs*, 520 U.S. at 841; *see generally Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (finding no preemption under an express preemption provision but finding implied preemption, without any mention of a presumption against such preemption).

> inconsistent with the contractual provisions.

5 U.S.C. § 8709(d)(1).

Thus, under the plain language of the statute, terms in OPM's FEGLI Program contract will preempt Va. Code § 20-111.1(D) if three conditions are met: (1) the contract provisions "relate to the nature or extent of coverage or benefits (including payments with respect to benefits)"; (2) Va. Code § 20-111.1(D) "relates to group life insurance"; and (3) Va. Code § 20-111.1(D) "is inconsistent with the contractual provisions." 5 U.S.C. § 8709(d)(1).[4] We discuss each of those elements in subsection 2 below. First, however, we address another argument by Petitioner that FEGLIA's preemption provision should be read narrowly.

1. FEGLIA's Preemption Provision Should Not Be Read "Modestly"

Petitioner argues that, because 5 U.S.C. § 8709(d) gives preemptive force to OPM's contracts (as opposed to statutory or regulatory provisions), it should be read modestly. Petitioner's Br. at 60 (citing *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006)). Petitioner's

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[4] We note that the preemption provisions related to other federal insurance programs have broader effect in that the other provisions' language contains no requirement that state law be inconsistent with the relevant contract provision for preemption to occur. *See* 5 U.S.C. § 8902(m)(1) (FEHBA); *id.* § 8959 (enhanced dental benefits for federal employees); *id.* § 8989 (enhanced vision benefits for federal employees); *id.* § 9005(a) (federal long-term care insurance); *see also Empire*, 547 U.S. at 686 ("under § 8902(m)(1) as it now reads, state law – whether consistent or inconsistent with federal plan provisions – is displaced on matters of 'coverage or benefits'").

reliance on *Empire* for this proposition is misplaced. The sole question there was whether the federal courts have subject matter jurisdiction over a FEHBA plan's claim for reimbursement against an enrollee, under several theories of jurisdiction including the doctrine of "complete preemption." *See Empire*, 547 U.S. at 682 ("This case concerns the proper forum for reimbursement claims."). Ultimately, the Court found that Congress did not intend FEHBA t "*completely* [] displace . . . state law" so as to "confer federal jurisdiction thereby." *Id.* at 698 (emphasis added). It was precisely in this context that the Court found "a modest reading of the [preemption] provision is in order." *Id.* However, there is no indication that the Court intended a modest reading in the context of ordinary (as opposed to "complete") preemption. Indeed, to the extent the Court addressed the issue of ordinary preemption at all, it found that reading the statute as having preemptive effect under the particular facts of the case was a "plausible construction[]." *Id.* But the Court found it unnecessary to resolve that question because federal jurisdiction was the only issue presented. *See id.*

It makes sense to treat modestly the ability of a federal agency to confer jurisdiction via contractual provisions, particularly since Congress was not directly addressing jurisdictional issues in FEHBA's preemption provision. Congress separately spoke to that issue in FEHBA's jurisdictional provision, 5 U.S.C. § 8912. Indeed, in the same section of the *Empire* decision that suggests a "modest reading," this Court found the existence of FEHBA's jurisdictional provision to be

"of prime importance" and said there was "no warrant to expand Congress' jurisdictional grant 'by judicial decree.'" *Empire*, 547 U.S. at 696 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

In contrast, a "modest reading" makes no sense in the context of non-jurisdictional express preemption. Although the Court in *Empire* did not find Congress to have addressed in FEHBA's preemption provision the jurisdictional issues there presented, Congress certainly was addressing the subject of preemption. For that purpose, the terms in the preemption provision should be read with their ordinary meaning, not modestly. The question of preemption "is one of statutory intent, and [this Court] 'begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation omitted).

In addition, there is nothing unusual about an agency possessing the ability to preempt state law. For example, even in the absence of an express preemption provision, an agency's "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982). While OPM's contracts are not the result of notice-and-comment rulemaking, courts have treated them as "rules under the Administrative Procedure Act." *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 80 (4th Cir. 1993); *see also Doe v. Devine*, 703 F.2d 1319, 1326 (D.C. Cir. 1983) (Ginsburg, J.) (Administrative Procedure Act suit

against OPM challenging the "agency's negotiation of a [FEHBA] contract"). In addition, this Court has previously given preemptive effect to the interactions between an agency and a private party. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-67 (1986) (holding that, in the utility rate-setting area, a tariff set by a private carrier and filed with a federal agency can preempt state law). In both FEGLIA and FEHBA, Congress has specifically stated that OPM's contracts are to have preemptive force (if the conditions in the preemption provision are satisfied). The same cannot be said of a typical federal regulation which, nonetheless, will preempt state law.

In this case, there is express preemption even under a modest reading of the statute. However, there is no reason to read FEGLIA's preemption provision modestly, in a non-jurisdictional setting. Instead, the preemption provision should be given its ordinary meaning. The only relevant question should be whether Congress intended the contractual terms at issue to have preemptive effect – in other words, have the three conditions enumerated by Congress in the preemption provision been satisfied?

2. All Three Conditions for Express Preemption Under 5 U.S.C. § 8709(d) Are Met in This Case

Section 5(A) of the FEGLI Program contract states that, in the event of an insured's death, "[p]ayment shall be made to the Beneficiary of record of the Employee or otherwise as provided in Section 11 hereof immediately after receipt of such proof [of the insured's death] and of proof that the

claimant is entitled to such payment." Master Policy, § 5(A), SG Lodg. at 18. Section 11 reiterates FEGLIA's order of precedence, stating that benefit payments shall be made to a designated beneficiary and, if there is none, to the individuals listed in the order of precedence. *Id.* § 11, SG Lodg. at 25; *see also Metro. Life Ins. Co. v. Christ*, 979 F.2d 575, 579 (7th Cir. 1992) ("MetLife's master policy expressly incorporates FEGLIA's order of precedence."). Section 11 also states that an insured can change a designated beneficiary "only by filing written notice thereof" with his or her government employing office, and that the change will take effect "only if it is received by the appropriate office prior to the death" of the insured. Master Policy, § 11, SG Lodg. at 25.

If the Court is inclined to address the issue of express preemption, the relevant question is whether any of the aforementioned OPM contract provisions preempt Va. Code § 20-111.1(D).

a. Both Section 5(A) and Section 11 of the FEGLI Program Contract Relate to the Nature or Extent of Coverage or Benefits (Including Payments With Respect to Benefits)

At the very least, both Section 5(A) and Section 11 "relate to . . . payments with respect to benefits." 5 U.S.C. § 8709(d)(1). In fact, the entire purpose of Section 5(A) is to set forth the recipient and the timing of FEGLI Program benefit payments. Section 11 similarly sets forth the recipient for benefit payments. Thus, the first requirement for express preemption is easily met in this case.

At one place in her brief, Petitioner argues that "Section 5(C) of the Master Policy is the *only* Section of the Master Policy which expressly preempts State law." Petitioner's Br. at 67 (emphasis added). Petitioner seems to be referencing the fact that Section 5(C) contains an express statement that it overrides state law because it provides that payments "shall be made without regards to any State law relating to the collection of taxes by any State" and that payment "shall in no event subject [OPM] to any liability under any tax law of any State." Master Policy, § 5(C), SG Lodg. at 20. Although Petitioner might be correct that these are the only provisions of the OPM contract explicitly saying that state law is overridden, Petitioner is wrong if she is implying that these are the only provisions of the contract that can have preemptive force. FEGLIA's preemption provision contains no requirement that a contract provision itself express an intent to preempt state law. Congress, in § 8709(d), has already expressed its clear intent that contract provisions can have preemptive effect if they "relate to . . . payments with respect to benefits." 5 U.S.C. § 8709(d). Because they plainly relate to benefits payments, Section 5(A) or Section 11 of the OPM contract can preempt state law, regardless of whether those contract provisions themselves mention preemption.

b. Va. Code § 20-111.1(D) Relates to Group Life Insurance

As Petitioner notes, the "relates to" language in preemption provisions like that in FEGLIA, while not limitless, is quite broad. Petitioner's Br. at 65 (citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001)); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (use of the phrase "relates to" in ERISA's preemption provision makes it "conspicuous for its breadth"); *Pilot Life Ins. Co.*, 481 U.S. at 47 (same).[5]

As Petitioner also seems to acknowledge (Petitioner's Br. at 64-65), the "relates to" language does not require that the state law make specific reference to group life insurance (although that would certainly be sufficient to meet the

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[5] It is also worth noting that Congress intended express preemption under FEGLIA to be broader in some respects than express preemption under even ERISA. On the whole, ERISA's preemption provision, 29 U.S.C. § 1144(a), is very similar to the ones in FEGLIA, FEHBA, and the statutes governing other federal insurance programs. *See Hayes v. Prudential Ins. Co. of Am., Inc.*, 819 F.2d 921, 926 (9th Cir. 1987) ("ERISA's preemption clause is similar to section 8902(m)(1) of the FEHBA."). One key difference, however, is that ERISA contains a so-called "saving clause," which saves from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A); *see also Hayes*, 819 F.2d at 926 (ERISA's saving clause "has no counterpart in the FEHBA"). Hence, in ERISA – which governs *private* employee benefit plans – Congress explicitly left room for the states to regulate in certain fields that they have traditionally occupied. But in FEGLIA – which governs a *federal* employee benefit plan – Congress left no such room and even overtly stated that preemption shall apply to state laws "relat[ing] to group life *insurance*." 5 U.S.C. § 8709(d) (emphasis added).

requirement). Instead, any state law – even state laws of general application – can "relate to" group life insurance.

For example, in various contexts, this Court has held that a state's general common law "relates to" a topic specified in a preemption provision, when a litigant attempts to apply the common law to the specified topic. *See, e.g., CSX Transp., Inc.*, 507 U.S. at 664 (state common law causes of action "relat[e] to railroad safety" within the meaning of the Federal Railroad Safety Act's preemption provision, 45 U.S.C. § 434 (recodified at 49 U.S.C. § 20106)); *Pilot Life*, 481 U.S. at 47 (state common law causes of action "'relate to' an employee benefit plan" within the meaning of ERISA's preemption provision, 29 U.S.C. § 1144(a)); *see also Cipollone*, 505 U.S. at 521-22, 548-49 (state common law causes of action can qualify as a "requirement or prohibition based on smoking and health . . . imposed under State law" within the meaning of the Public Health Cigarette Smoking Act's preemption provision, 15 U.S.C. § 1334).

So too has this Court held that broadly applicable state statutes "relate to" the subject listed in a preemption provision, where the state statute would operate on the listed subject. *See, e.g., Morales*, 504 U.S. at 383 (finding that "a State's general consumer protection laws" relate to airline rates, routes, or services so as to fall within the ambit of the Airline Deregulation Act's preemption provision, 49 U.S.C. § 41713(b)(1)); *see also id.* at 386 (dismissing the argument that the preemption provision "imposes no constraints on laws of general applicability," a theory this Court has "consistently rejected" in the ERISA context).

Courts of Appeals have also held that laws of general application can be preempted if their particular use in a case "relates to" the prohibited subject. *See, e.g., Metro. Life Ins. Co.*, 979 F.2d at 579 (finding state divorce decree to be expressly preempted under FEGLIA); *Hayes*, 819 F.2d at 926 (finding state common law and statutory claims to be preempted under a predecessor version of FEHBA's current preemption provision).

In this case, Va. Code § 20-111.1(D) relates to group life insurance under any reasonable understanding of the phrase "relates to." The Virginia statute is at least as closely related to group life insurance as the state laws in the cases just mentioned were to the subjects specified in the respective preemption provisions, and compared to most of those cases the Virginia statute is much more related. In the ERISA context, the Court has stated that a state law "relates to" an employee benefit plan, and therefore is preempted, "'if it has a connection with or reference to such a plan.'" *Egelhoff*, 532 U.S. at 147 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). A state law makes "reference to" ERISA plans where it "acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997). To determine whether a state law has a "connection with" an ERISA plan, courts "look . . . to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Both

the "connection with" and "reference to" tests are met in this case.

Va. Code § 20-111.1(D) specifically references – and at the very least has a connection with – group life insurance because the cause of action created by the statute exists only if subsection (A) of the statute "is preempted by federal law *with respect to the payment of [a] death benefit*." Va. Code § 20-111.1(D) (emphasis added). The statute defines "death benefit" to "include[] any payments under a life insurance contract." *Id.* § 20-111.1(B). Further, the defendant and the amount of liability in any cause of action under Va. Code § 20-111.1(D) are also specifically defined with reference to the original payment of death benefits. The defendant is a "former spouse" who "receives the payment," and the amount of liability is "the amount of the payment." *Id.* The statute's express reliance on the existence of death benefits (including group life insurance benefits) is more than enough to cause it to "relate to" group life insurance. It makes no difference that the state statute also applies to other types of death benefits. *See District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130-31 & n.3 (1992); *FMC Corp.*, 498 U.S. at 59.

In addition, and as Petitioner points out (Petitioner's Br. at 12), a central aspect of any life insurance plan is its order of precedence setting forth the person or persons to whom benefits will be paid. Va. Code § 20-111.1(D) certainly "relates to" that aspect of group life insurance because the statute's entire purpose is to defeat the express order of precedence contained in the group life insurance contract (and in FEGLIA itself).

Having conceded that subsection (A) of the Virginia statute is expressly preempted by FEGLIA (Petitioner's Br. at 4-5), Petitioner's only real argument that Va. Code § 20-111.1(D) should escape preemption is that its cause of action does not arise until after the death benefits are paid to the designated beneficiary and, therefore, that administration of the benefits is not directly affected. But that makes no difference for at least two independent reasons.

First, Petitioner's argument that a law cannot "relate to" group life insurance if it affects only post-benefit-payment issues would impermissibly narrow FEGLIA's preemption provision by effectively changing the phrase "relates to group life insurance" to "regulates pre-payment aspects of group life insurance." A state law that seeks to regulate a pre-payment aspect of group life insurance – such as subsection (A) of Va. Code § 20-111.1 – undoubtedly "relates to" group life insurance, as even Petitioner concedes. But Congress used the phrase "relates to" and not "regulates" in 5 U.S.C. § 8709(d); thus, that provision must preempt state laws in addition to those that directly regulate some pre-payment aspect of group life insurance. *See Morales*, 504 U.S. at 385; *cf. Pilot Life*, 481 U.S. at 50 (finding that a state law did not "regulate" insurance even though it "related to" an employee insurance plan).

Second, and more importantly, Va. Code § 20-111.1(D) is nothing more than a blatant attempt to revive Va. Code § 20-111.1(A), despite the fact that subsection (A) is plainly preempted by FEGLIA's beneficiary designation and order of precedence provisions (both those in the statute and those in

the OPM contract). As this Court held in *Wissner* and *Ridgway*, a purpose of those provisions is to give the insured "the right freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office" so "'that the proceeds belong to the named beneficiary and no other.'" *Ridgway*, 454 U.S. at 56 (quoting *Wissner v. Wissner*, 338 U.S. 655, 658 (1950)). Subsection (A) of the Virginia statute upsets that purpose by voiding certain beneficiary designations, and it is expressly preempted for that reason, as Petitioner concedes. Va. Code § 20-111.1(D) is just a creative attempt to undo the effects of that preemption, and it similarly upsets the purpose of the beneficiary designation and order of precedence provisions by directing the proceeds away from the named beneficiary and "to the person who would have been entitled to it [under § 20-111.1(A)] were [that] section not preempted." Va. Code § 20-111.1(D).

That creative attempt to avoid preemption must fail. "Pre-emption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A.*, 568 U.S. ___ (2013) (slip op. at 7-8). "In a preemption case . . . a proper analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it." *Id.*, slip op. at 8. Allowing Virginia to avoid the preemptive effect of the OPM contract's beneficiary designation and order of precedence provisions through the creation of a cause of action against the designated beneficiary "would make a mockery of

[FEGLIA's] preemption provision." *Id.* (quoting *Nat'l Meat Ass'n v. Harris*, 565 U.S. ___ (2012) (slip op. at 10)); *see also Free v. Bland*, 369 U.S. 663, 669 (1962) (a federal regulation granting sole title in federal bonds to a surviving spouse preempts a state law's "simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner"). Accordingly, Va. Code § 20-111.1(D) relates to group life insurance no less than subsection (A) of that statute does.

c. Va. Code § 20-111.1(D) Is Inconsistent With Section 5(A) and Section 11 of the FEGLI Program Contract

The requirement of an inconsistency is easily met in this case, for reasons that have already been discussed. The contract terms effectively mandate that "'that the proceeds belong to [Respondent] and no other'" (*Ridgway*, 454 U.S. at 56 (quoting *Wissner v. Wissner*, 338 U.S. 655, 658 (1950)); application of Va. Code § 20-111.1(D) would take those proceeds from Respondent and give them to Petitioner. The contract states that beneficiary changes can occur only via a written notice filed with a government employing office before the insured's death; application of Va. Code § 20-111.1(D) would effectively change the beneficiary through another means. The contract terms and the Virginia statute are flatly inconsistent.

Once again, the fact that Va. Code § 20-111.1(D)'s cause of action arises only after the initial payment of benefits makes no difference, for the reasons already stated. In addition, *Ridgway* forecloses that argument because the sole state law preempted there was also a post-payment cause of

action: the imposition of "a constructive trust on the proceeds of [the insured's] insurance." *Ridgway*, 454 U.S. at 49-50; *see also Free*, 369 U.S. at 669.

Each of these arguments independently defeats Petitioner's assertion that the OPM contract and Va. Code § 20-111.1(D) are actually consistent because "most people do not want pre-divorce testamentary directions in favor if an ex-spouse to be honored." Petitioner's Br. at 14; *see also id.* at 63-64. But there are also additional reasons for rejecting this claim by Petitioner. For instance, as Respondent points out (Respondent's Br. at 45-47), Petitioner's argument rests on a questionable assumption about what an insured intends through his or her inaction. That assumption is especially dubious in light of OPM's clear notices to federal employees that their designated beneficiaries will remain as such until changed in writing and submitted to the government employing office.

Moreover, and more importantly, the intent of the insured – either insureds generally or Mr. Hillman specifically – is irrelevant for preemption purposes. The preemption analysis must focus on the intent of Congress and, in this case, the intent of OPM because Congress delegated to the agency the ability through its contracts to preempt inconsistent state laws relating to group life insurance. It is abundantly clear that neither Congress nor OPM share Petitioner's belief that pre-divorce beneficiary designations should, by default, not be honored. The unambiguous language in both FEGLIA and the OPM contract says the exact opposite: that no beneficiary changes will occur by default and that any changes

must be made in writing and must be filed with the government employing office in order to be effective.

* * *

Because (1) the OPM contract's beneficiary designation and order of precedence provisions relate to payments with respect to benefits, (2) Va. Code § 20-111.1(D) relates to group life insurance, and (3) Va. Code § 20-111.1(D) is inconsistent with the aforementioned OPM contractual provisions, the Virginia statute is expressly preempted by FEGLIA. Nothing more need be shown in order for express preemption to occur.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

ANTHONY F. SHELLEY
Counsel of Record
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W.
Suite 900
Washington, D.C. 20005
(202) 626-5800
ashelley@milchev.com

DAVID M. ERMER
ERMER LAW GROUP, PLLC
1413 K St., NW
6th Floor
Washington, D.C. 20005
(202) 833-3400
dermer@ermerlaw.com

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